

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

LAND CASE NO. 432 OF 2017

**HELLENA KUSUSYA.....PLAINTIFF
VERSUS
DENNIS MATHEW MABUBU.....1ST DEFENDANT
KCB BANK TANZANIA LIMITED.....2ND DEFENDANT
YONO AUCTION MART &
COMPANY LIMITED.....3RD DEFENDANT**

JUDGMENT

Date of last order: 30/11/2020

Date of Judgment: 14/12/2020

NDUNGURU, J.

In this case the plaintiff one Hellena Kusunya claims against the defendants jointly and Severally for declaration that the purported mortgage deed and sale of the landed properties on Plot No. 9 Block 4 with CT 87881, Plot No. 280 Block 5 with CT 8533697789 situate at Kichangani area in Morogoro and Plot No. 337 Block D situate at Kihonda area in Morogoro municipality is unlawful and unjustified.

The plaintiff this prays for judgment and decree against the defendants jointly and severally for the following:

- (i) A declaration that any purported alienation or sale of the suit properties is unlawful.
- (ii) A declaration that the disposition of the properties by mortgage is unlawful.
- (iii) A permanent injunction restraining the defendants themselves or their successor's in title or assigns contractors, agents, workmen servant or whoever claiming title under them from trespassing and/or selling the suit premises, carrying out any eviction thereon and/or interfering in any way with the plaintiff's legal possession and occupation of the suit properties;
- (iv) Costs of the suit.
- (v) Any other relief that this honourable court deem fit and just.

The facts of this case are briefly that; the plaintiff is the wife of the 1st defendant. That during the subsistence of their marriage through their joint efforts acquired various properties including landed properties which are plot No. 9 block 4 with certificate of occupancy No. 87881 and plot No. 280 Block 5 with Certificate No, 85336997789 situate at Kichangani area and plot No. 337 block D with title No. 97786 located at Kihonda area in Morogoro Municipality. That all properties are registered in the name of the 1st defendant.

That sometimes in 2014, the 1st defendant trading in the name of DENMANS GENERAL TRADE entered into the loan agreement with the 2nd defendant (Bank) for advancement of loan to the tune of 650,000,000/=. As a security of the said loan, the 1st defendant mortgaged the three landed properties to the 2nd defendant without obtaining consent of the plaintiff who is the wife with legal and equitable interest in the properties. That upon default to repay the loan, the 2nd defendant through Yono Auction Mart & Co. Limited advertised to sell through Public auction the said matrimonial properties which were mortgaged without spouse consent.

To prove her case the plaintiff's side had four witnesses while the defence had only one witness. The case was heard ex parte against the 1st defendant upon failure to file written statement of defence on time prescribed, as per order of the Court dated 17/10/2019 in terms of Civil procedure Code (Amendment of First Schedule) GN No. 381 of 2019

DW1 one Helana Kususya told the court that she is living at Morogoro at Kihonda with her family. She said Dennis Mathew is her husband. That they contracted Christian Marriage on 15/09/1990 at Kalemela A Village at Urambo District at Tabora. That the marriage contracted is monogamy. That they were blessed with five children. PW1 said she doesn't know one Grace lameck Lusesa.

PW1 went on testifying that during their life they have managed to acquire landed propertied plot 337 block D locate at Kihonda, the Second is a business house (Hotel) plot No. 280 block 5 located at Kichangani and the third is plot No. 9 Block 4 located at Kichangani. PW1 said one day she saw the auction of all the properties in the local newspaper, when made follow up she realized that her husband had mortgaged the said landed properties as collateral to the loan facility secured at the 2nd

defendant (KCB Bank) and had defaulted to pay it. That she was never involved in any way when her husband secured loan. That she never consented. PW1 said with her husband were doing business and farming. That most of her time she used to be at Urambo supervising cultivation of Tobacco for business purpose.

PW1 tendered the Certificate of marriage No. B. 0221970 as exhibits (Exh. P1). PW1 said the name "Mabubu" which appears in the Certificate of Marriage is the 1st defendant's clan name also the name Kusunya is her grandmothers name. That during Marriage ceremony they were taken photos. She tendered photos as exhibit P2. PW1 said having filed this case the relationship with her husband is worse, they do not talk to each other. The witness prayed the Mortgaged be declared nullity for lack of spouse's consent.

Upon cross examination PW1 said, she is also called Hellena Daud Kayamba or Hellena Daudi Kasanga all are her names. She said she is standard seven. She has not produced deed poll. PW1 said Dennis Mathew Mabubu, Dennis Mathew Masanzya are names of the same person. That she did not saw bank documents. The one who secured loan

is her husband. That they had a wholesale Shop. The hotel was built used capital from the whole sale shop. That she knows nothing about the loan. She has never been involved, as she was most of the time living at Tabora farming. She said she is living at Kihonda Plot No. 337 Block D. The hotel is plot No. 280. PW1 said although it is a business house, it cannot be mortgaged without her consent. She said she does not know Grace Lameck. Her husband cheated the bank. The Christian marriage they contracted is monogamous. On re-examination PW1 said she was not involved in any way. It is her husband who secured loan she made the choice of the name which is appearing in the certificate of marriage

Edina Dennis Mathew Msanzya testified as PW2. Her testimony was to the effect that Hellena Kususya (PW1) is her mother and Dennis Mathew Mabubu is her father. That she was born at Urambo in 28/12/1996. She tendered birth certificate No. 0596741 dated 19/08/2005 as exhibit P3. PW2 said, Helena Daud Kayamba is her mother's name which appears in the certificate. Hellena Kususya is her baptism names. Helena Daud Kayamba are the names used before she was baptized. The father's names in the Certificate is Dennis Mathew

Msanzya. The name Dennis Mathew Mabuku are the names used after baptism.

That she is living at Kihonda in the family home plot No. 337 Block D. That she knows nothing about the loan secured by her father at KCB bank. That she does not know Grace Lameck Lusesa. Her father is a businessman and farmer. That she is aware that the house they are living is in the process of being auctioned because it was mortgaged by his father. On cross examination PW2 told the court that, they are living at Kihonda house plot No. 337 block D. That before this matter they lived together with her further at Kihonda but he has left home. Her mother has been most the time living at Urambo farming. That she had never seen the people doing valuation. Edina Msanzya is their relative. In 2014 she was school she is now working at Arusha. That her father is called Dennis Mathew Msanzya but her baptism name is Dennis Mathew Mabubu.

PW3 one Richard Petro Mdaki testified to the effect that he is living at Kaliua at Tabora. Before shifting to Kaliua he was living at Urambo. That he knows Dennis Mathew Mabubu. He has married Hellena Daud on 15/9/1990 and PW1 was his bestman (patron) in their marriage. It was a

Christian marriage he signed the certificate of marriage. He identified the Certificate (Exh. P1). PW3 went on saying, the names appearing in the Certificate are the baptism name Mabubu is the name of his grandfather . That Martha Julius was a matron or witness of Helena. PW3 tendered baptism Certificate, driving license and voters card as Exhibit "P4".

On cross examination, PW3 said he signed the certificate of marriage as a witness. Martha Julius witnessed for Helena. That Mabubu is his relative. He does not know the properties he is owing. He does not know Grace Lameck Lusesa.

PW4 one Martha Julius testified to the effect that she is living at Tabora . She knows Helena Kususya (PW1) that on 15/09/1990 she witness the marriage between Dennis Mathew Mabubu and Helena Kususya. It was a Roman Catholic Marriage. That she signed Marriage Certificate as a witness (PW4 identified Exh. P1). PW4 tendered the Voter's registration Card as Exhibit 'P5' to prove the names.

On cross examination PW4 Said Kuyamba is Helena's mother name that Dennis Mabubu and Masanzya is the same person. She does not know the properties of Dennis.

DW1 one Hilorims Mayombo testified to the effect that he is employed by KCB Bank , he is stationed at the head office at Osterby. He is head of Debt Recovery department. That his role is to recover debts to the customers who have defaulted payment. DW1 told the court that Dennis Mathew Mabubu is not their customer. The Properties mortgaged do not belong to the plaintiff, further Dennis Mathew Mabubu has never mortgaged any property to the 2nd defendant. DW1 told the court that Dennis Mathew Msanzya had loan facilities with the Bank of Africa. The loan facility dated 12/09/2014 was tendered and admitted as Exh. D1. That the facility was between Dennis Mathew Msanzya and the 2nd defendant. The loan was 650,000,000/= in which 500,000,000/= was a term loan facility for three years with 19% of interest per annum and 150,000,000/= was the overdraft facility for one year term. That the term loan was payment of loan taken from the Bank of Africa.

DW1 told the court that the collaterals were three house which are plots No. 9 block 4, Plot No. 280 block 5 and plot No. 337 block D all located at Morogoro. The mortgages were stamped to cover 812,500,000/=, all, the landed properties were in the name of Dennis Mathew Msanzya. The mortgage deeds of the landed properties were admitted as exhibit D2

collectively. The said mortgage deeds were witnessed by one Dominic Kushumbugu advocate on 18/9/2014.

DW1 told the court that the spouse consent of the three plots was obtained. The spouse consent was admitted as exhibit "D3". It was signed on 18/09/2014. DW1 went on testifying that the 2nd defendant made a valuation of the landed properties so as to know the value of the said properties. DW1 tendered the valuation report of the three properties as exhibit which were admitted and marked as Exh. D4 collectively. He went on testified that plot No. 280 Block 5 is the hotel while the other two are residential houses.

DW1 told the court that before accepting the mortgage the 2nd defendant made an official search of the said buildings the incumbrance was that the landed properties were mortgaged to the Bank of Africa no any other caveat. DW1 told the Court that the 2nd defendant removed the incumbrance by paying the loan secured to the Bank of Africa. That Dennis Mathew Msanzya having default paying the 2nd defendant issued a sixty (60) days statutory notice but the he could not manage to pay it. Then 2nd defendant engaged one Yono Auction Mart to auction the mortgage

properties so the 2nd defendant may recover the money advanced to the mortgagor. The witness prayed the suit be dismissed.

On cross examination DW1 told the court that different names connote different people. That the officers of the bank (2nd defendant) visited the properties. It was the bank officials from, Morogoro branch. That what is important to the bank is the spouse consent only not the "Certificate of Marriage". He said he does not know Grace Lameck Lusesa he has never seen her, that the fact that the spouse consent was attested by the advocate the 2nd defendant believed it. That he has no documentary evidence that the 2nd defendant took over the debt from the Bank of Africa. That the passport attached to the spouse consent resembles to the plaintiff in court. He does not know where Grace Lameck is.

On re-examination DW1 said when mortgaging, residential house was resided by Grace Lameck Lusesa and Dennis Mathew Msanzya the husband. He knows Grace Lameck through bank official documents. The advocate who attested spouse consent had the duty to see the spouse. By looking at the passport he could not say exactly who was she. The plaintiff has sued the Bank, Dennis Mathew Mabubu and Auction Mart. The Bank needs

only spouse consent. The loan facility was delt with at Morogoro branch. (This was the end of the defendant's case). That was the end of the plaintiff and defendant case.

During the final pre trial conference the following issues were framed.

- (i) Whether the mortgages created by the 1st defendant in favour of the 2nd defendant we w lawful.
- (ii) To what reliefs are the parties entitled.

On the 1st issue above, the main complaint of the plaintiff is that the suit properties could have not been mortgaged because they are matrimonial properties in which her consent was to be sought. PW1 was of the testimony that she contacted Christian marriage with the 1st defendant way back in 1990 at Kalemela A Village in Urambo District at Tabora PW1 tendered the Marriage Certificate to prove the existence of Marriage between her and the 1st defendant. (Exh. P1). Her evidence was further corroborated by the evidence of PW3 and PW4 who were witnesses to her marriage with the 1st defendant.

It was a further testimony of PW1 that during the subsistence of their Marriage, which is still there, through joint efforts they managed to

acquire various landed properties including; Plot No: 9 Block 4, Plot No. 280 Block 5 which are located at Kichangani in Morogoro and plot No. 337, Block D situated at Kihonda, Morogoro. According to her (PW1) all the named landed properties were mortgaged by the 1st defendant to the 2nd defendant for the loan facility he secure without her consent.

The procedure of mortgaging a landed property is well stipulated under the Land Act and Mortgage Financing Act. 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 mortgage under section 59 (1) of the Law of Marriage Act compelling any party who had an interest over a property to be mortgaged to register caveat so as to preserve his/her interest. After the amendment the lodging of caveat is no longer a requirement of law , Section 8 (2) (3) of the Mortgage Financing Act has imposed such responsibility to the mortgagor to disclose the information of the spouse. Section 8 of the Act reads:

".....It shall, be the responsibility of the mortgagor to disclose that he has a spouse or not and upon such disclosure the

mortgagee shall be under the responsibility to take reasonable step to verify whether the applicant for a mortgage has or does not have a spouse"

From the wording of section 59 of the Law of Marriage Act, and section 114 of the Land Act consent of the spouse or spouses is a mandatory requirement when one of the spouses intends to mortgage the landed property acquired by the joint efforts of the spouses/spouse

DW1 evidence was that the 2nd defendant one Dennis Mathew Mabubu is not the customer of the 2nd defendant. That the mortgaged properties are in the name of Dennis Mathew Msanzya and the 2nd defendant, (Exh. D1) that mortgage deeds were prepared and register (Exh. D2) and obtained spouse's consent (Exh. D3) and made a valuation (Exh, D4).

DW1 told the court that the mortgage was right. That the plaintiff has no equitable interests to the properties mortgaged because Dennis Mathew Mabubu is not the one who secured loan nor mortgaged the landed property to the 2nd defendant. DW1 told the Court that Dennis Mathew Mabubu and Dennis Mathew Msanzya are two different people.

The piece of evidence of DW1 suggests therefor that it is Dennis Mathew Msanzya whose landed properties were mortgaged and further that her wife one Grace Lameck Lusesa consented. Thus the plaintiff with her husband one Dennis Mathew Mabubu are not known to the 2nd defendant.

From the above rival evidence of the plaintiff and 2nd and 3rd defendant, the contentious issue here is whether Dennis Mathew Msanzya and Dennis Mathew Mabubu is one person. Unfortunately enough the said Dennis Mathew Mabubu upon Service of the pleading never appeared to defend the case. The reason for his non appearance is best known to him.

To my view it was only the said Dennis Mathew Mabubu who was in the best position to denounce that he is not Dennis Mathew Msanzya and that Helena Kususya is his wife. As stated above unfortunately the said Dennis Mathew Mabubu has not appeared in court. To my view therefore in his absence nobody can stand to talk on his behalf. Thus is the doctrine of estoppel could have applied against him if he could have come with another set of version.

Looking at the pleadings para 6 of the plaint states:

6. " That the plaintiff is marriage to Dennis Mathew Msanzya
@ Mabubu the 1st defendant....."

It is therefore that the said Dennis Mathew Msanzya is also known as Mabubu. It has always been the @ name becomes very popular then official name sometimes. But again, PW2 when testified told the court that PW1 is her mother, the witness tendered her birth certificate (Exh. P3) the Certificate (Exh. P3) was issued in 2005 by the District Registrar of Births and Deaths at Urambo. Looking at the name surname of the father of the PW2 it is Dennis Mathew Msanzya. PW2 told the court the names of Dennis Mathew Mabubu is the name used after his father's baptism. PW2's testimony was further that they are living in the family home plot No. 337 Block D situate at Kihonda at Morogoro which is also mortgaged and is in the process of being auctioned. When cross examined PW2 told the court that even plot No. 280 block 5 and plot No. 9 Block 4 all located at Morogoro are family properties.

Taking into account of all the circumstances that PW1 and PW2 talks of the same person be it by the name of Dennis Mathew Msanzya or Dennis Mathew Mabubu, the properties Mortgaged to the 2nd defendant being the

one identified by PW1 and PW2 which are subject of being actioned, further that PW3 and PW4 being the witnesses of their marriage and that para 5 of the plaint refers the 1st defendant by the name of Dennis Mathew Msanzya @ Mabubu, and Exh. P3 the Certificate of birth of PW1 which names the father of PW2 are Dennis Mathew Msanzya, being guided with the standard of proof in Civil Cases and applying the “principle of res gestae” provided under section 8 of the Evidence Act (Cap 6 RE. 2019), I am satisfied that, the said Dennis Mathew Msanzya who appears in the Landed properties mortgaged the is one and the same person who is referred as Dennis Mathew Mabubu who is the very husband of PW1.

DW1 when testified told the court that the 2nd defendant had a spouse’s consent (Exh. D3). That the spouse who consented was one Grace Lameck Lusesa. The evidence of PW1 is that the Marriage she contracted with the 1st defendant was a Christian and in particular Monogamous Marriage, that is why she does not recognize Grace Lameck Lusesa if at all she exists.

DW1 when testified told the court that for the bank only spouse consent is needed. The Bank does not need to have Marriage Certificate. I think that,

the 2nd defendant had obligation to ascertain the marital status of the mortgagor as envisaged under section 114(2) of the Land Act which provided:

*"For the purpose of subsection(3) it shall be the responsibility of the mortgagee to **take reasonable steps to ascertain whether the application for a mortgage has a spouse or spouses consent**" (emphasis mine)*

The duty is casted to the mortgagee to take reasonable steps to verify whether the applicant for a mortgage has or does not have the spouse. The question is what can guide the mortgagee in verification of the mortgagor's spouse; To my view the mortgagee must see or get the Certificate of Marriage. If the Marriage is registered such information can be obtained at RITA. But from the evidence of DW1, the 2nd defendant was satisfied with the spouse's consent which was presented. No any further diligent and reasonable step was takes to ascertain that Grace Lameck Lusesa was the wife of the 1st defendant in this case the "Mortgagor."

Take it as the fact that the spouse's consent presented to the 2nd defendant was genuine. The law is to the effect that it is the applicant/

mortgagor who discloses the spouse. Looking at the spouse's consent (Exh.P3) the said consents were attested at Dar-es Salaam while the said wife and husband were residing at Morogoro. Though it is not a requirement of law that the document be attested at the place the attestator resides, but if attestation could have been done at Morogoro could have been more reliable. I am saying so because in the spouse's consent which were attested at Dar es -Salaam, the said Grance Lameck Lusesa is known personally to the advocate she was not identified by the mortgagor. The question is how did the advocate know her to be the wife of Dennis Mathew Msanzya while the two were living at Morogoro.

Again when DW1 testified, as I have stated above, said what the bank needs is the spouse consent and not certificate of marriage. I had ample opportunity to go through Bank facility/loan agreement . (Exh. D1) under heading ANNEXTURE 1 (List of the documents required by the bank), the item No. 4 is **Spouse Consents for all charged landed properties, Supported by a copy of marriage certificate and certified copies of identities of the spouses and photographs or relevant affidavits thereto.** The reason is simple that it is through Certificate of Marriage one can ascertain the spouse.

My intention is not to challenge the marriage between the 2nd defendant and one Grace Lameck Lusesa, This is because this is a Land case not matrimonial cause. But if the 1st defendant had another marriage apart from that which he contracted with PW1 the second marriage could not alienate PW1's right and interests over the landed properties which they jointly acquired. Thus the need for the consent from PW1 was still prevailing. In the absence of such consent the mortgage is a nullity.

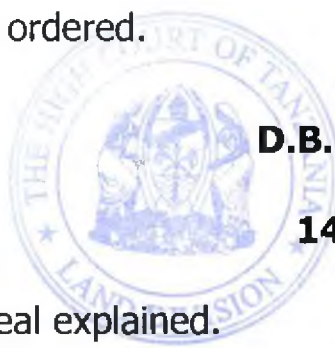
Being guided by the law of Evidence Act (Cap 6 RE 2019) on the standard of proof in Civil cases that the standard is the balance of probabilities, I am inclined to as I do hold that the plaintiff has successfully proved the case to the balance of probabilities.

In the premises I hold that the mortgage of the suit properties plot No. 9 block 4 with certificate of title No. 87781 and Plot No. 280 Block 4 with certificate of Title No. 85336997789 all, situate at Kichangani area and Plot No. 337 block D with Certificate of title No. 97786 situate at Kihonda all situate at Morogoro Municipality was a nullity for want of the plaintiff consent, I further order for permanent injunction restraining the defendant by themselves or their successors in title or assignees agents, workmen

or whoever claiming the title under them from trespassing and/or selling the suit premises or interfering in any way the plaintiff's legal possession and occupation of the suit premises.

Costs of this suit be provided.

It is so ordered.




D.B. NDUNGURU
JUDGE
14/12/2020

Right of Appeal explained.