

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

LAND CASE NO. 367 OF 2015

**KMM SAVING & CREDIT
COOPERATIVE SOCIETY LIMITED.....PLAINTIFF**

VERSUS

PELES YELEJE MHEBO (As Administratrix of
JOHN SHEGE MATABA (Deceased).....**1st DEFENDANT**
**ACCESS MICRO-FINANCE
BANKTANZANIA LIMITED.....2ND DEFENDANT**
FRANK JACKSON.....3RD DEFENDANT
RIMBO COMPANY LIMITED.....4TH DEFENDANT

Date of Order: 07.05.2021
Date of Judgment: 30.07.2021

JUDGMENT

V.L. MAKANI, J

The plaintiff in this suit KMM SAVING & CREDIT COOPERATIVE SOCIETY LIMITED has instituted this suit seeking for judgment and decree against the defendants as follows:

- (a) *Declaration that the plaintiff is the legal owner of the suit premisses known as Plot No. 3 Block "C" with CT No. 88443 situated at Mbande Dar es Salaam.*
- (b) *Declaration that the purported mortgage on the sit property known as Plot No.3 Block "C" with CT No. 88443 situated at Mbande Dar es Salaam is illegal, null and void.*

- (c) Declaration that the defendants are trespassers to the suit house.*
- (d) Payment of by the defendants jointly or severally of TZS 420,000/= per day from 10th November 2015 to the date of judgment.*
- (e) Payment by the 1st Defendant of TZS 20,000,000/= being exemplary damages.*
- (f) Payment of general damages.*
- (g) Costs be borne by the defendants.*
- (h) Any other reliefs this Hon Court may deem fit and proper to grant.*

The plaintiff is a saving and credit society under the Cooperatives Societies Act No. 15 of 1991. In the plaint the plaintiff is alleging to have bought the house on Plot No. 3 Block "C" with CT No. 88443 situated at Mbande Dar es Salaam (the **suit house**) from the late John Sheghe Matabu at the tune of TZS 90,000,000/=. The plaintiff further allege that she paid the full purchase price for the suit house as agreed in the Sale Agreement and the suit house was handed over to the plaintiff who commenced doing bar and guest house business. The plaintiff further alleges that without their knowledge the late John Sheghe Matabu entered into a loan contract with the 2nd defendant Access Bank Tanzania Limited (the **Bank**). The Bank is allegedly gave

a 60 days' notice on 10/11/2015 showing intention to sell the suit house following the default by the late John Sheghe Matabu to repay the loan granted to him. The outstanding loan as at the date of the notice was TZS 54,255,504.91. The plaint states that ~~said~~ while there was a pending suit in court the 4th defendant auctioned the suit house on 10/11/2015 to the 5th defendant. The late John Shege Matabu died on 18/11/2016 and his wife Pelesi Yeleje Mhebo the 1st defendant herein was appointed the administratrix of his estate by Kerege Primary Court.

The Written Statement of Defence (the **WSD**) by the Bank was general. The said WSD reflect that the late John Shege Matabu took a loan of TZS 85,000,000/= and offered the suit house as security to the loan. The WSD further states that the late John Shege Matabu defaulted in repayment of the loan and though he was served with notice he could not repay the loan. The Bank had to sell the suit house that was pledged as security to loan.

The 3rd and the 4th defendants though duly served did not enter appearance or file their WSD so the matter proceeded ex-parte against them.

The issues drawn for determination were as follows:

- (a) *Who is the lawful owner of the suit house on Plot No. 3 Block C Mbande Area Temeke Municipality in Dar es Salaam.*
- (b) *Whether there was a lawful creation of the mortgage over the suit house to the 2nd defendant by the late John Sheghe Mataba (the 1st defendant).*
- (c) *Whether the defendants are trespassers to the suit house.*
- (d) *To what reliefs are the parties entitled to.*

The plaintiff prosecuted their own case. Several advocates had the conduct of the case on their behalf, but they abandoned the plaintiff in the last minutes. Mr. Kimaro who is the Vice Chairman led the other plaintiff witnesses.

Joseph John Mmasi was **PW1**. He said the house was bought by the plaintiff from one John Sheghe Mataba at TZS 90,000,000/=. He said the last instalment of the purchase price was paid to the Bank on 2016. But the late John Sheghe Mataba did not give them the Certificate of Title of the said suit house though the house was already in their hands and doing business. He said the late John Shege Mataba took a loan without telling them. He said when officers of the Bank visited them, they found that the owner was not the late

John Shege Mataba. He further averred that they went to the Bank with the late John Shege Mataba and he acknowledged the debt and said he would pay the plaintiff, but he did not do so until he died. He said he died before the case was concluded and so the plaintiff was unable to get the Certificate of Title. On cross-examination **PW1** admitted that the late John Shege Mataba had acknowledged to have a loan at the Bank, and he requested from the plaintiff TZS 40,000,000/= so that he could clear the debt at the Bank and get the Certificate of Title. **PW1** said the late John Shege Mataba did not give them the said Title but told them to pay the balance of the amount of TZS 18,000,000/=. He said the TZS 40,000,000/= was paid to the late John Shege Mataba's account.

PW2 was Mary Stephano Chuwa. She said she was one of the leaders of the plaintiff. She said they wanted a business, and they bought a house from John Shege Matabu @ Majani. She said the Bank Officers came to the house and found her and asked if she was the owner or a tenant. She said she told the Officers that the plaintiff was the owner of the suit premises. **PW2** said they went to the Bank with the late John Shege Mataba and he admitted that he was indebted to the plaintiff, but he said he was taking a loan from NBC to repay the loan

of the Bank. He said the late John Shege Mataba did not repay the debt and he continued to avoid the leaders of the plaintiff. She said they had to come to court, but the late John Shege Mataba entered appearance only once before he passed away. She said the wife had to be joined as she was the administratrix of the estate of his husband. **PW2** said that the wife told them that the late John Shege Mataba had other loans elsewhere. **PW2** said she was the Executive Director of the plaintiff and there was a Sale Agreement between the plaintiff and the late John Shege Mataba (**Exhibit P1**). On clarification to the court, **PW2** admitted that they were aware that the Certificate of Title of the suit house was with Access Bank.

PW3 was Constantine Peter Kimaro. Vice Chairman of the plaintiff's society said they are in court because they are claiming the Certificate of Title of the suit house. He said the plaintiff bought the said house and paid the purchase price in three instalments and after the last instalment the late John Shege Mataba was supposed to give the plaintiff the Certificate of Title, but he did not have any. **PW3** said the late John Shege Mataba told them to give him time but still he could not present them with the Certificate of Title. He said they had to go to the Bank, but they later went to an Advocate and agreed

that the late John Shege Mataba would give them the Certificate of Title. He said after that the Bank Officer came to the suit house and that is when they came to court and unfortunately John Shege Mataba died. He said they never knew where the late John Shege Mataba lived until after three years when they found the wife in Bagamoyo.

DW1 was Peresi Yeleji Mhebo the administratrix of the estate of the late John Sheghe Mataga. She said her late husband was looking for clients to buy his house and he got the plaintiff. She said her husband had loans at NMB Bank and Access Bank and the monies from the plaintiff were paid in these accounts. She said he was trying to pay the debt of the Bank, but he died. She said she thought that insurance would pay the debt but later the Bank came to sell the house. She prayed for the court to grant the right to the plaintiff. In cross examination she admitted that her husband had taken loans in NMB (TZS 30,000,000/=), Azania Bank (TZS 30,000,000/=), Akiba (TZS 16,000,000/=) and Access Bank (TZS 80,000,000/=). She said the other banks cleared the debts by her husband but not Access Bank. She admitted that she had never seen any insurance documents pertaining to the loan at Access Bank.

Bertha Kapufi was **DW2**, the Bank Officer of the Bank. She said the late John Shege Mataba took a loan of TZS 85,000,000/= in 2014. There were loan documents, that is, a Loan Agreement and a Security Agreement. She said before the grant of the loan, a search (**Exhibit D1**) was conducted, and it showed that CT No. 88443 was in the name of the late John Shege Mataba. She said what followed was registration of the Mortgage and the Certificate of Title (**Exhibit D2**) was presented to the Bank as security. She said all the documents **Exhibit D1** and **Exhibit D2** were copies as the originals were with the purchaser in the process of transfer. She said when the late John Shege Mataba defaulted in repayment of the loan they issued him with a notice. She said she did not know the plaintiff's society; the Bank only knew John Shege Mataba. On cross-examination, **DW2** said there was no insurance of the loan as it is an option by the customer. She said the Bank was aware that John Shege Mataba died but before his death he agreed that the suit house be sold. She further said there was no need of informing the Administratrix of the sale because there was already an agreement of sale between the Bank and the late John Shege Mataba, and further there was no order barring the sale of the suit house.

Having heard the evidence by the parties I will now embark on determining the issues as raised.

It is a fundamental principal of law under Section 110 (1) (2) and 112 of the Law of Evidence Act CAP 6 RE 2019 that whoever desires a court to give judgment in his/her favour he/she must prove that those facts exist. In the case of **Abdul Karim Haji vs. Raymond Nchimbi Alois & Another, Civil Appeal No. 99 of 2004** (unreported) the Court of Appeal held that:

".....it is an elementary principle that he who alleges is the one responsible to prove his allegations"

Also, in the case of **Anthony M. Masanga vs. Penina (Mama Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014 (CAT)** (unreported) where it was further held that the party with legal burden also bears the evidential burden on the balance of probabilities.

In the present case, the burden of proof at the required standard of balance of probabilities is left to the plaintiff being the one who alleged that she is the owner of the suit house and the late John

Shege Mataba unlawfully mortgaged the suit house to the 2nd defendant and ultimately the 2nd defendant allegedly sold it to the 4th defendant. What this court is to decide upon is whether the burden of proof has been sufficiently discharged by the plaintiff.

It is the law that ownership of landed property in a surveyed/planned area is proved by Certificate of Title or the least Letter of Offer. Section 2 of the Land Registration Act, CAP 334 RE 2019 defines "owner" as follows:

"Means, in relation to any estate or interests the person for the time being in whose name that estate or interest is registered"

In the case of **Salum Mateyo vs. Mohamed Mateyo [1987] TLR 111** this court held that proof of ownership is by one whose name is registered. In most instances, proof of ownership of land is by Letter of Offer or Certificate of Title and the onus of proof of ownership lies on the that party (in this suit the plaintiff) who has alleged this fact.

In the present case, it is not in dispute that the suit house is located in a surveyed area and is duly registered vide Certificate of Title No. 88443. The only proof by the plaintiff of ownership of the suit house is the Sale Agreement (**Exhibit P1**); and in the course of the hearing

of the case, none of witnesses of the plaintiff had any proof that the plaintiff was the registered owner of the suit house. **PW1**, **PW2** and **PW3** did not have the Certificate of Title of the suit house, they all testified that they were following up with the late John Shege Mataba an exercise which they failed as they were informed that the said Certificate of Title was deposited in the Bank as security over a loan taken by the late John Shege Mataba. **DW1** and **DW2** all testified to the fact that the Certificate of Title of the suit house was in the name of the late John Shege Mataba. According to section 2 of the Land Registration Act cited above, a prima facie proof of ownership of a registered land is its registration and in this matter the Certificate of Title. As the plaintiff did not have the said Certificate of Title registered in their name the Sale Agreement (**Exhibit P1**) alone cannot prove that the suit house is duly registered and is owned by the plaintiff. The Certificate of Title in the name of the plaintiff would have been substantial proof that title had passed from the late John Shege Mataba to the plaintiff. As it is now the copy of the Certificate of Title (**Exhibit D2**) shows that there exists a mortgage by the late John Shege Mataba in favour of the Bank. In the absence of the Certificate of Title being registered in the name of the plaintiff, the

court cannot declare the plaintiff the lawful owner of the suit house and I hold as such.

The second issue is whether there was a lawful creation of the mortgage over the suit house to the 2nd defendant by the late John Sheghe Mataba. Since it has been established hereinabove that the plaintiff is not the owner of the suit house, the second issue becomes redundant because the plaintiff is not a party to the mortgage. It would be a misdirection, in the present instance, to question the lawfulness of the mortgage between the late John Sheghe Mataba and the Bank whereas the plaintiff is not privy to the said mortgage. In my considered view the plaintiff has no cause of action against the Bank and determining whether there was a lawful creation of the mortgage between the late John Sheghe Mataba and the Bank would be a misconception.

Having established that the plaintiff is not the lawful owner of the suit house, the third issue whether the defendants are trespassers is answered in the negative.

Now, what are the parties entitled to? The plaintiff has claimed

general and exemplary damages at TZS 20,000,000/= to be awarded by the court. The court discretionarily awards general damages after taking into consideration all relevant factors of the case. An award of general damages is to try and place an injured party in as good position as that party would have been had the wrong complained of not occurred (see the case of **Tanzania-China Friendship Textile Company Limited vs. our Lady of Usambara Sisters [2006] TLR 70**). Exemplary or punitive or vindictive damages are damages given not merely as pecuniary compensation for the loss sustained by the plaintiff, but also as a kind of punishment to the defendant (see **Derogations Eugen Mallya @ Deogratius Mallya & Another vs. Alex Alban Lema & Another, Civil Case No. 4 of 2019 (HC-Moshi)** (unreported).

In the present case, as stated hereinabove, it is apparent that the injury/loss on the plaintiff in this whole transaction was self-imposed. Practically, the plaintiff as a purchaser of the suit house had an obligation to have knowledge of the nature of the property being bought from the late John Shege Mataba. In fact, the plaintiff is bound by principle of "*buyer beware*" (**caveat emptor**) which assumes that buyers will inspect and otherwise ensure that they are confident with

the integrity of the product or land before completing a transaction. A buyer of landed property where a house is situated is supposed to make a search, make on-site inspections of the property, and make enquiries if there are any existing disputes over the property, boundaries, right of way, maintenance of roads and the like. In fact, according to the testimony of **PW1, PW2, and PW3**, as officers of the plaintiff, were aware of the loan taken by the late John Shege Mataba but they decided to continue with the finalisation of the sale transaction by paying the balance purchase price to the late John Shege Mataba. I may call this laxity on their part or negligence and as such I do not find it necessary to award any damages to the plaintiff and I hold as such.

In the result and for the reasons I have strived to address, I hold that the plaintiff has failed to prove her case to the standards of law required and is not entitled to any of the reliefs prayed in the plaint. The suit is therefore without merit and is hereby dismissed with costs.

It is so ordered.


V.L. MAKANI
JUDGE
30/07/2021

