

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO.95 OF 2019**

**YUSNETH MASAMBIRO SADOCK ..... PLAINTIFF**

**VERSUS**

**1. EQUITY BANK LTD ..... 1<sup>ST</sup> DEFENDANT**

**2. NUTMEG AUCTION MART ..... 2<sup>ND</sup> DEFENDANT**

**3. PETER KARUMBA ..... 3<sup>RD</sup> DEFENDANT**

**4. GILBERT THOMAS MMASI ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

*Date of the last Order: 27.09.2021*

*Date of Judgment: 30.09.2021*

**A.Z. MGEYEKWA, J**

This suit was lodged before this court by the Plaintiff herein YUSNETH MASAMBIRO SADOCK against the Defendants herein EQUITY BANK LTD,, NUTMEGA AUCTION MART, PETER KARUMBA and GILBERT THOMAS

MMASI. Plaintiff is claiming against the defendants jointly and or severally for declaratory orders that the house situated at Plot No. 110 Block 320, Title No. BA 49760 in Kinondoni Dar es Salaam is a matrimonial home and cannot be disposed of without the spouse consent.

The facts of the case can be deciphered from the pleadings and evidence on record go thus: the Plaintiff claims that the 3<sup>rd</sup> Defendant is her husband after contracted a Christian marriage on 27<sup>th</sup> November, 1993. According to the Plaintiff during the subsistence of the marriage between the Plaintiff and 3<sup>rd</sup> Defendant they managed jointly to purchase a Plot No.110 Block 320 certificate No.BA 49760 Kinondoni, Dar es Salaam. The Plaintiff and the 3<sup>rd</sup> Defendant together and their family are residing in the property situated at Plot No.110 Block 320 certificate No.BA 49760 Kinondoni, Dar es Salaam.

On 5<sup>th</sup> July, 2019 the 2<sup>nd</sup> Defendant representatives arrived at the house located at Plot No.110 Block 320 certificate No.BA 49760 Kinondoni, Dar es Salaam informing them that they have intended to conduct auction of the property situated in Plot No.110 Block 320 certificate No.BA 49760 Kinondoni, Dar es Salaam. The said house was indicated to be auctioned on the following day for the owner default to discharge the mortgage. The Plaintiff contacted the 3<sup>rd</sup> Defendant for an explanation since the Plaintiff did

not know about the existing mortgage. The Plaintiff reported the matter to the District Commissioner of Kinondoni to protect the property. The Plaintiff claimed that the mortgaged property collateral is Plot No.110 Block 320 certificate No.BA 49760 Kinondoni, Dar es Salaam. The same was obtained by the 4<sup>th</sup> Defendant from the 1<sup>st</sup> Defendant was fraudulently executed since the Plaintiff was not consulted.

In her Complaint, the Plaintiff prays for Judgment and Decree against the defendants jointly and severally for the following orders as follows:-

- (a) *The Plaintiffs severally and jointly are the legal owners of the suit premises and the Defendant is a trespasser.*
- (b) *An order permanently injunction to restrain the Defendant, his servants or anybody acting on his interest, from any way interfering with the Plaintiff ownership of the suit premises.*
- (c) *Eviction order to issue to the Defendant.*
- (d) *An order for TZS. 920,000,000/= for general damages or any other reasonable amount that, this Honourable Court shall deem just to grant.*
- (e) *Costs be provided for.*
- (f) *Such further/other relief(s) as the Court may deem just to grant.*
- (g) *Any other relief(s) this Honourable Court may deem fit to grant.*

On the other hand, the Defendants, in response to the Plaintiff's claims, has filed a Written Statement of Defence.

It is imperative at the outset to point out that, this matter has also gone through the hands of my brother; Hon. Maige, J and Hon. Hamza, Deputy Registrar who conducted the 1<sup>st</sup> Pre-Trial Conference and Mediation respectively. I thank my predecessors for keeping the records well and on track. I thus heard the testimonies of the witnesses for the parties and now have to evaluate the evidence adduced by the witnesses to determine and decide on the aforementioned issues.

At all the material time, the Plaintiff was represented by Mr. Gabriel Maduna, learned Advocate, while the first and second Defendants enjoyed the legal representation of Mr. Tarimo, learned counsel. The third and fourth Defendants appeared in person, unrepresented.

Upon completion of all preliminaries, the Final – Pre Trial Conference was conducted and the following issues were framed by this Court:-

- 1) *Whether the suit property is a matrimonial asset.*
- 2) *If the first issue is answered affirmatively whether the Plaintiff consented to the mortgage in question.*
- 3) *To what reliefs are the parties entitled.*

Following the global outbreak of the Worldwide COVID - 19 pandemic (Corona virus), the court invoked its power under Order XIX Rule 1 of the Civil Procedure Code Cap. 33 [R.E 2019] and ordered the facts of this case be proved by an affidavit. The Plaintiffs were ordered to file the affidavits of his witnesses before or by 31<sup>st</sup> March, 2020 and the Defendants filed their affidavits on 15<sup>th</sup> April, 2020. Cross examination and tendering of documents was scheduled on 7<sup>th</sup> May, 2021.

To prove the above issues, the Plaintiffs' side had one witnesses, Ms. Yusneth Masambiro Sadock, who testified as **PW1**. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants called one witness; Hosea Samwel Kasima, who testified as **DW1**. The 3<sup>rd</sup> Defendant had one witness; Mr. Peter Karumba who testified as DW2 and the 4<sup>th</sup> Defendant had one witness, Mr. Gilbert Thomas MMASI, who testify as DW3.

The plaintiff's side tendered one (1) documentary Exhibits to wit; a Marriage Certificate that was admitted by this Court and marked as **Exhibit P1**. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant tendered one (1) documentary Exhibits to wit; a Spouse Consent that was admitted by this Court and marked as **Exhibit D1**. The 3<sup>rd</sup> Defendants tendered one (1) documentary Exhibits to wit; a copy of title deed that was admitted and marked as **Exhibit D2**, Mortgage of Right.

of Occupancy was admitted and marked as **Exhibit D3**, A Personal of Guarantee and Indemnity that was admitted as **Exhibit D4**. The 3<sup>rd</sup> Defendants tendered one (1) documentary Exhibits to wit; a reminder letter to service the loan that was admitted and marked as **Exhibit D5**.

In his effort to prove his case, Yusneth Masambiro Sadock, the Plaintiff who paddled his own canoe in this matter appeared in Court and through his affidavit which was adopted by this court she testified as follows; she is the legal wife of the 3<sup>rd</sup> Defendant, they got married on in 1993 and blessed with three issues; Andrew Peter, Mary Peter, and John Peter. To substantiate her testimony she tendered **Exhibit P1**, the Marriage Certificate. The Plaintiff testified that immediately after their marriage they bought Plot No.110 Block 320 certificate No.BA 49760 Kinondoni, Dar es Salaam.

PW1 continued to testify that surprisingly on 5<sup>th</sup> July, 2019 the 2<sup>nd</sup> Defendant representative arrived at the house located at Plot No.110 Block 320 certificate No.BA 49760 Kinondoni, Dar es Salaam. PW1 went on to testify that they were informed that they have intended to conduct an auction of the property situated in Plot No.110 Block 320 certificate No.BA 49760 Kinondoni, Dar es Salaam. PW1 said that the house was indicated to be auctioned on the following day for owner default to discharge the mortgage;

The Plaintiff went on to testify that thereafter she contacted the 3<sup>rd</sup> Defendant for an explanation since she did not know about the existing mortgage. PW1 continued to testify that, she reported the matter to the District Commissioner of Kinondoni to protect the property and the District Commissioner ordered the 2<sup>nd</sup> Defendant to halt the ongoing activity and follow proper procedure.

The Plaintiff testified that the Defendants act has caused her a lot of inconveniences mentally and economically since she was surprised thus he had immediately to protect the interest of the said property. PW1 concluded her testimony by praying for this court for judgment and decree against the Defendants jointly and severally for orders stated in the Plaint.

When PW1 was cross examined by Mr. Tarimo, she testified to the effect that she is dispute the mortgage which secured the 4<sup>th</sup> Defendant's loan she testified that the original certificate of title is with the bank and the same bears the name of the 3<sup>rd</sup> Defendant. PW1 said that they reported the matter to the District Commissioner. PW1 testified that she was involved in procuring the loan and she did not gave her consent.

The first Defendant on his side called one witness; Mr. Hosea Samwel Kasiba. He disputed all the allegations and testified that the Plaintiff was aware of the existence mortgage and she personal issued her irrevocable

consent on 11<sup>th</sup> June, 2014 for creation of the mortgage. DW1 went on to testify that the Plaintiff did not prove any form, extent of inconvenience she was subjected to and she had no other interests to protect as she relinquished the same after issuance of her consent. DW1 said that the Plaintiff did not prove that the mortgaged property is a matrimonial home and there is a proper spouse consent obtained from the Plaintiff.

When DW1 was cross examined, he testified that the title deed in respect to Plot No.110 Block 320 certificate No.BA 49760 Kinondoni, Dar es Salaam is the mortgage that secured the 4<sup>th</sup> Defendant's loan. He admitted that before issuing any loan they were required to investigate the matrimonial property on which they did and found that the property is matrimonial property. DW1 testified further that in their investigation they found that the 3<sup>rd</sup> Defendant's wife one Yusneth Peter signed the spouse consent. DW1 went in to testify that he did not handle the matter but one Mwinyi was the one who sphered the procedure. DW1 further testified that the 4<sup>th</sup> Defendant did not pay the debt of Tshs. 230,000,000/= in full. He added that in case the loan is fully liquidated then the titled deed is normally released or returned to the owner. DW1 testified that the spouse consent forms are handled by the external lawyers who called the client, his guarantor, and his spouse to finalize the spouse consent Plaintiff.



DW1 continued to testify that he testified that they normally verify all documents which are brought to the Bank. He testified that the 3<sup>rd</sup> Defendant is the one who confirmed that the Plaintiff was his wife. Insisting, DW1 testified to the effect that the loan was not fully paid and the second loan was required to be secured.

When DW2 in his affidavit, testified that he is the Plaintiff's husband married in 1993 and blessed with three issues. DW2 testified that he and the Plaintiff bought a Plot No.110 Block 320 certificate No.BA 49760 Kinondoni, Dar es Salaam and constructed a matrimonial house. To substantiate his testimony he tendered a Certificate of Title that was admitted and marked as Exhibit D2. A matrimonial house standing on Plot No.110 Block 320 certificate No.BA 49760 Kinondoni, Dar es Salaam in the name of Peter Karumba who acted as a Guarantor, was mortgaged to secure the loan. A Certificate of Title thereof; CT No. 813 – DLR (henceforth "the CT"), was tendered in evidence and admitted as Exh.P4. He guaranteed the 4<sup>th</sup> Defendant to secure loan from the 1<sup>st</sup> Defendant. DW2 testified that he asked the 1<sup>st</sup> Defendant on the effect of lack of the Plaintiff's consent and the 1<sup>st</sup> Defendant told him to submit the Plaintiff's picture which will be fixed on the loan form.

The 2<sup>nd</sup> Defendant continued to testify that the 4<sup>th</sup> Defendant informed him that he entered into loan contract with the 1<sup>st</sup> Defendant on 30<sup>th</sup> May, 2014 in a tune of Tshs. 230,000,000/=. He testified that he guaranteed the 4<sup>th</sup> Defendant to secure loan from the 1<sup>st</sup> Defendant by attaching the 3<sup>rd</sup> Defendant's title deed for a loan in a tune of Tshs. 230,000,000/=. He denied to have guaranteed the 4<sup>th</sup> Defendant after the contract dated 30<sup>th</sup> May, 2014. He testified that there were more than the loan he guaranteed to the 4<sup>th</sup> Defendant to secure a loan from the 1<sup>st</sup> Defendant without his knowledge in different periods. The 3<sup>rd</sup> Defendant concluded by praying for this court to declare that the house situated at Plot No.110 Block 320 Title No.BA 49760 Kinondoni, Dar es Salaam is a matrimonial home and cannot be disposed of without the spouse's consent.

When DW3 was cross examined by Mr. Tarimo, he testified that the Plaintiff did not give her consent. He testified that he signed the spouse consent in the absence of his wife. He admitted that he signed the mortgage deed and was not sure if the loan was fully been paid by the 4<sup>th</sup> Defendant, he testified that the bank informed him that the title deed cannot be returned because there was pending outstanding payment. He admitted that he is aware that the 4<sup>th</sup> Defendant obtained a second loan in a tune of Tshs. 250,000,000/= and he signed the document in regard to the second loan. To

substantiate his submission a Mortgage of Right of Occupancy and a Personal Guarantee document was admitted and marked as Exhibit D3 and Exhibit D4 respectively.

The last witness was Gilbert Mmasi who testified as DW3. He testified that he is a businessman. He testified that he is aware of the existence of Plot No.110 Block 320 certificate No.BA 49760 Kinondoni, Dar es Salaam. DW3 testified that in 2014 he procured a business loan of Tshs. 230,000,000/= from the 1<sup>st</sup> Defendant to expand his business capital, the loan which was secured by a third party mortgage created on the suit property by the 3<sup>rd</sup> Defendant. DW3 testified further that the mortgage was created by the 3<sup>rd</sup> Defendant without the consent of the Plaintiff. He ended by testifying that the sale of the suit property is illegal since the loan repayment was frustrated by the 1<sup>st</sup> Defendant and that the mortgage on a suit property was illegally created by the 3<sup>rd</sup> Defendant and the 1<sup>st</sup> Defendant.

When DW3 was cross examined by Mr. Gilbert, he testified that he knew that the mortgage was a family property. He testified that he was not aware that his wife was involved in the whole process of obtaining a loan. DW3 testified that he took a loan in a tune of Tshs. 230,000,000/= by using the 3<sup>rd</sup> Defendant's title deed. He testified that after he obtained the second loan in

a tune of Tshs. 250,000,000/= and the Bank deducted Tshs. 50,000,000/= thus the first loan ended. DW3 further testified that the lawyer asked for the ID and passport size of the Plaintiff thus he knew that the Plaintiff was required to sign the consent paper. He testified that he did not know if the Plaintiff's consent was needed in the second restructuring of the loan.

When DW3 was cross examined by Mr. Tarimo, he testified that the loan in a tune of Tshs. 230,000,000/= was paid in full and the title deed was also used as a security in the second loan. He testified that he did not witness if the Plaintiff gave her consent.

Having heard the testimonies of both parties and considering the final submission of the 4<sup>th</sup> Defendant, I am in position to confront the issues framed for determination of the present dispute between the parties. In addressing the first issue *whether the suit property is matrimonial asset*. Without wasting the time of this court, I have to say that there is no dispute that the suit property located in Plot No.110 Block 320 Title No.BA 49760 Kinondoni, Dar es Salaam is a matrimonial home. The Plaintiff and the 3<sup>rd</sup> Defendant testified to the effect that they bought the Plot No.110 Block 320 Title No.BA 49760 Kinondoni, Dar es Salaam together immediately after

being married and constructed a family house. Moreover, it is evident that the suit property is a matrimonial property since the Bank requested the 3<sup>rd</sup> Defendant to submit a spouse consent in order to proceed with other procedure of issuing the said loan. Therefore, this issue is answered in the affirmative.

*Next for consideration is the second issue, if the first issue is answered affirmatively whether the Plaintiff consented to the mortgage in question.*

Parties have butting heads on this issue. The main dispute is on the spouse's consent. The Plaintiff testified to the effect that she was not aware that the matrimonial house was mortgaged by the 3<sup>rd</sup> Defendant to guarantee the 4<sup>th</sup> Defendant to obtain a loan. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants testified to the effect that the Plaintiff was not present when they were finalizing the loan process and when they were asked to bring the Plaintiff's ID and picture. Instead the Bank after receiving the Plaintiff's passport size they informed the 3<sup>rd</sup> Defendant that they will contact the Plaintiff. In other words, they are saying that the proper procedure in procuring the spouse's consent was not complied with. On the other side, DW1 testified to the effect that the Plaintiff is the one who consented the mortgage and they issued the loan after making sure that all procedures for obtaining a loan were fulfilled.

The requirement of spousal consent for purposes of disposition cannot be over-emphasized. The position of the law on this matter is clear, section 59 is providing a requirement of consent in the processes of sale, lease, and mortgage. For ease of reference, I reproduce section 59 (1) of the Law of Marriage Act, Cap. 29 [R.E. 2002] as hereunder:-

***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 the 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).***

Reading the above provision of the law, it is clear that the spouse cannot alienate matrimonial home by way of sale, gift, lease, mortgage, or otherwise without the consent of the other spouse while the marriage subsists. Also, Section 112 (3) of the Land Act No. 4 of 1999 provides that a mortgage of a matrimonial home shall be valid only if the document or form used in applying

for such mortgage is signed or assented by the borrower and any spouse of the borrower living in that matrimonial home.

Applying the above provisions of the law in the circumstances of this case; I had to go through the purported spouse consent to find out whether there are any elements that proves that the Plaintiff gave her consent. I have tried to compare the Plaintiff's signature appearing in the spouse consent. The signature in the certificate of marriage and other pleadings are not the same compared to the one appearing in the purported spouse consent.

The Mortgage Financing (Special Provision) Act 2008 has amended Section 8 of the Mortgage Financing (Special Provision) Act 2008 which amended Section 114 of the Land Act by deleting subsection 2 and introduce a new provision; that it shall be the responsibility of the mortgagor to disclose that the mortgage shall be under the responsibility to take reasonable steps to verify whether the Applicant for a mortgage has or does not have a spouse. I expected the Bank to prove the anomalies by calling a proper witness who prepared the spouse consent to clear the doubts since the name appearing in the spouse consent are not the same appearing in other

pleadings, the Plaintiff's name is written Yuseth Peter Peter while her proper name is Yusenth Masambiro Sadock.

The spouse's consent raises an eyebrow, whether the Plaintiff gave her consent. Contrary to that this court has to believe the Plaintiff's did not give her consent and therefore it cannot be said that the spousal consent was properly obtained. Therefore, the mortgage which was used to secure the 4<sup>th</sup> Defendant's loan remains void *ab initio* for want of a spouse consent. The second issue is answered in the affirmative.

Addressing the last issue, to what relief the parties are entitled to. In determining this issue I have found that the default was on the 3<sup>rd</sup> Defendant who proceeded to give the 1<sup>st</sup> Defendant, the Plaintiff's passport size without consulting her and the bank for failure to properly follow the proper procedure in obtaining or involving the spouse in registering of the mortgaged landed property. In that regard have found that as long as the Plaintiff's husband was involved in the whole process the same renders the Plaintiff not to receive any costs.

In the upshot, I declare that the house is situated at Plot No.110 Block 320 Title No.BA 49760 Kinondoni, Dar es Salaam is a matrimonial house the 1<sup>st</sup>



In the result, no general damage can be awarded on the basis of unproven evidence. Therefore, I proceed to dismiss the suit since the Plaintiff has failed to prove her claims against the defendants on balance of probability as is the standard require by the law. No order as to costs.

Order accordingly.

DATED at Dar es Salaam this 29<sup>th</sup> September, 2021.

  
A.Z.MGEYEKWA  
**JUDGE**  
29.09.2021

Judgment delivered on 29<sup>th</sup> September, 2021 in the presence of Mr. Sande, learned counsel for the 1<sup>st</sup> Defendant also holding brief for Mr. Bashir, learned counsel for the Plaintiff and Mr. Fredrick Massawe, learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendant also holding brief for Ms. Aziza Msangi, learned counsel for the 2<sup>nd</sup> Defendant in the absence of the 5<sup>th</sup> Defendant.

  
A.Z.MGEYEKWA  
**JUDGE**  
29.09.2021

Right to appeal full explained.