

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

LAND CASE NO. 283 OF 2017

MWANGAZA RAMADHANI OMARY.....PLAINTIFF

VERSUS

TWIGA BANCORP LTD.....1st DEFENDANT

MPANGO 2005 (T) LIMITED.....2ND DEFENDANT

FELIX MODESTUS MPANGO.....3RD DEFENDANT

**MAIDA WAZIRI (as legal administrator of
WAZIRI JUMA WAZIRI)4TH DEFENDANT**

J U D G M E N T

Date of Last Order: 27.10.2021

Date of Judgment: 10.12.2021

T. N. MWENEGOHA, J.

The background of this case is that in March 2016, the 2nd defendant was issued with a Loan amounting to USD 600,000. The disputed property which is a house located on Plot No. 4, Kurasini West, Temeke Municipality in Dar es Salaam City with a Certificate of Title No. 186099/45 L.O No. 22801 in the name of Waziri Juma Waziri was mortgaged as security for the Loan. The 2nd defendant failed make payment as per terms and agreement and the Bank started to make effort to recover the loan through sale of mortgaged property.

It is then when the plaintiff instituted this suit, claiming to have not consented to mortgaging the disputed property and prayed for the Court to declare that the Mortgage of CT No. 196099/45, LO No. 22801, Plot No. 4, Block "C" Kurasini West, Temeke Dar es Salaam is tainted with illegalities, misrepresentation, and fraud.

Upon failure of the Mediation, five issues were agreed and trial commenced. These are:

1. Whether the disputed property is matrimonial property or home
2. Whether the plaintiff gave her consent for use of the property by the defendants as collateral to secure the loan
3. Whether the plaintiff registered her interest in the suit property.
4. Whether the mortgage was lawfully created.
5. What reliefs are parties entitled to.

My discussion will highlight each issue and analysis of the testimonies leading to the decision of the Court.

Starting with the 1st issue as to whether the disputed property is a matrimonial property or home; it was PW1 testimony that she contracted Islamic marriage with the deceased 4th Defendant in the 1960. To prove this, she tendered a Marriage Certificate registered in 2017 which was admitted as Exhibit P1. She narrated on how they met and lived on the early years of their lives to the point of settling at their house in Dar es salaam. She claimed that she is the only wife and they had six children but only two are remaining. She told this Court that she had contributed in building the Kurasini house (disputed property) and she is a custodian of the

Certificate of Title for the same. It was noted that the Certificate of Title was registered after this case has been filed.

She continued to tell this Court that she contributed in the acquisition of the mortgaged property through money obtained in her business and through supervision of the construction of the mortgaged property. She added that by that time her husband was serving the government as the District Commissioner.

The testimony of the PW1 was backed up by the testimony of DW6, Maida Waziri Juma, the daughter of the plaintiff and the deceased 4th defendant, who was holding a power of attorney to represent the 4th defendant before his demise. She was then appointed to be administratrix of the estate of the fourth defendant and was accordingly recorded as such in this case, hence the substitution of the name of the 4th defendant.

In defense, the 3rd defendant testified that the deceased 4th defendant swore an affidavit that his wife died in 1956. Therefore, he is a sole owner of the mortgaged property. That, he testified in the presence of his advocate and official Bank Officer (DW1) that he does not have a wife. That the said Affidavit was tendered before land registry. The testimony of the 3rd defendant was backed up by the testimony of DW1, DW2 & DW3 to some extent as it will be shown below.

I have gone through the testimonies and evidence given from all parties. Among other things, I have established that there is no dispute regarding Exhibit P1, that it was registered after the case was instituted, which raises concerns. However, when the testimonies of PW1 and DW6 are taken into account, it establishes that the 4th defendant was living with the plaintiff as

husband and wife and together they had children. DW6 is one of the children who were presented to Court and all parties did not object to this fact. With such evidence, I conclude that, at the time the Mortgage Deed was signed, the plaintiff herein and the deceased 4th Defendant were indeed husband and wife.

Moreover, DW6, denied to the fact that her father, Waziri Juma Waziri, had signed documents expressing that he had no wife. The testimony given in Court reveals that the plaintiff and the deceased 4th defendant were living in the mortgaged house before renting the same and moving to a different family. That, it was agreed by family members that the property be leased to a tenant who transformed it into residential cum godown, and the family is since then accommodated into a clan house which is not a matrimonial property.

I am therefore satisfied with that testimony and evidence that the disputed property is a matrimonial property as the plaintiff and 4th defendant built it together and were living in it before renting the same.

In addressing the 2nd issue as to whether the plaintiff gave her consent to use the property by the defendants as collateral to secure loan, I considered the testimony given for and against this matter. Of interest is Exhibit D2, a declaration signed by the deceased 4th defendant declaring that his wife is dead. It is evident then, that the plaintiff's consent was not sought with a reasoning that she is dead.

However, the finding of this Court above has highlighted that the plaintiff, being a wife of the deceased 4th defendant, was living with the deceased 4th defendant when Mortgage Agreement was entered. Therefore, the tendered

Exhibit D2 showing that the (4th defendant then) Waziri Juma Waziri's wife is a deceased has no effect. The plaintiff's consent was needed prior to committing their matrimonial property as collateral and the same was not sought.

I will now address the 3rd issue as to whether the plaintiff registered her interest on the suit property Plot No. 4 Block "C" kurasini west. With regard to this issue PW1 testified before this Court that the mortgaged property was registered under her husband's name, that of the deceased 4th defendant, Waziri Juma Waziri. She also informed this Court that they were able to build the house after selling their two other properties which they were both owning so as to afford building the disputed property in between the year 1968 and 1970. It was her testimony further that due to her husband being a District Commissioner stationed in different parts of the country, she had to oversee the building of the house all by herself. That, at the time she was carrying small business vending buns and other bites; and was able to contribute some money in their house construction.

In his testimony, DW1 informed this Court that they had taken due diligence to ensure that the house had no third-party interest and they were assured that was the case therefore they are surprised that the plaintiff is claiming ownership. I am in agreement that the Certificate of Title is registered with the deceased 4th defendant's name, Waziri Juma Waziri, however, that does not change the fact that spouse consent was needed for the property to be used as a collateral. I am satisfied that, the plaintiff, being the wife of Waziri Juma Waziri, has interest in the property.

In addressing the 4th issue as to whether the mortgage was lawful, PW1 informed this Court that the purported mortgaged of the suit property is tainted with illegalities, fraud and misrepresentation. This is due to the fact that at the time the Mortgage Deed was signed, the deceased 4th defendant was ill and with impaired eyesight. That, in consideration of such health status of the deceased 4th defendant, even if he had actually signed the Mortgaged Deed, that agreement should be declared illegal as the deceased 4th defendant was not capable of entering such transactions without any assistance in understanding the same.

She also submitted that the signature in the Mortgage Deed is not the signature of the deceased 4th defendants, Waziri Juma Waziri. She further urged this Court to find the mortgage entered unlawful as it is lacking her consent as a spouse and a co-owner of the property.

Highlighting the testimony of DW2, a senior registration officer at the Land Registry office, he informed this Court that on the 5th April, 2016 the registry office received an Application for registration of the said mortgage from Twiga Bancorp Ltd, together with the Certificate of Title and Affidavit showing that the deceased 4th defendant is not married. That, upon examination, they noted that there were some differences in the signatures of the deceased 4th defendant. That, the signature of the deceased 4th defendant they had appearing in the Certificate of Title was different from all other documents submitted by the bank. DW2 further testified that, such anomaly was easily recognized by their eyes and upon examining the deceased 4th defendant's identification documents.

Similarly, in giving his testimony, DW3, who introduced himself as a lawyer who had drafted the Affidavit and Mortgage Deed for the deceased 4th

defendant, described to this Court that the deceased 4th defendant was a middle-aged man who seems to be in his 50's. He testified that when he went to his office, he was accompanied by an old man who is well on his 80s.

I will also highlight the testimony of DW5, Detective Corporal Hamisi Namkuha, a handwriting expert from Forensic Bureau. It was his testimony that the Chief of Forensic Bureau was requested by High Court, Land Division to go through some documents in order to establish their authenticity (Exhibit D7).

He informed this Court that the Forensic Bureau had received several documents including a Mortgage of Right of Occupancy of 2012, Building Contractor's Pay slip of 1978, National Provident Fund Form No. 20 of 1985 and Certificate of Right of Occupancy of 1966 all with signatures of Waziri Juma Waziri, the deceased 4th defendant.

He testified that after thorough investigation they established that the signatures in the documents examined were not the same. He informed this Court that he submitted several proofs on the findings including a report together with photographic enlargement showing the differences between disputed and spacemen signatures. The same was admitted as Exhibit D8.

Turning to the testimony of DW6, an administratrix of the deceased 4th defendant, she informed this Court that the deceased, Waziri Juma Waziri did not sign the documents as at the time the mortgage was purported to be signed, his father was an old man of 86 years with vision impairment and unstable mind. She claimed that even though her father was not totally blind, he could not see and he had to be led around. That, he could not have

transacted and or read the terms of the mortgage agreement in the absence of any assistance and none of them were involved. She informed this Court that, they had a family meeting when his father was still living and he denied to have taken any loan from the Bank or swearing Affidavit that he had no wife.

I have taken into Consideration of all testimonies and evidence given in order to prove this issue. I note that the testimony of DW3 regarding the identification of the deceased 4th defendant, Waziri Juma Waziri, when he appeared before him to sign the Mortgage Deed is different from that of 3rd defendant, who also gave testimony as DW4. DW3 described the deceased 4th defendant as a middle-aged man of about 54 years of age and when he appeared before him, he was accompanied by an old man of approximate 80 years of age.

However, the 3rd defendant testified that when the deceased 4th defendant was giving his Certificate of Title and signing Mortgage Deed he was of around 80 years of age, or above.

This testimony of the 3rd defendant is collaborated with the testimony of DW6 who proved to Court that, the deceased 4th defendant, Waziri Juma Waziri, was 86 years old in 2016. Moreover, PW1 testified to this Court that the signature in the Mortgage Deed is not that of her husband, Waziri Juma Waziri.

All this evidence was supported further with the testimony of DW2 who informed this Court that after receiving documents from the Bank (Mortgage Deed and Affidavit) he realized that the signatures contained therein were different from the signatures contained in the Certificate of Title.

Further to that, Forensic report tendered before this Court by DW5 has shown that the signatures in the Mortgage Deed and that of his disputed Affidavit are not the signatures of the deceased 4th defendant, Waziri Juma Waziri. All the above testimonies raised doubt as to the legality of the Mortgage transaction purported to be entered between the Twiga Bancorp Ltd and the and the deceased 4th defendant, Waziri Juma Waziri. The doubt is highly raised and solidified by the fact that the plaintiff, who also has interest in the property is denying the transaction and any involvement in it. That, as a legal wife she was neither informed nor consented to the transaction, if ever there was one.

With such proof before me, I am satisfied that the Mortgage transaction is illegal because the Mortgage Deed and other accompanied legal documents and requirements are tainted with illegalities, fraud and mis-presentation.

In addressing the 5th issue as to the reliefs that parties are entitled to, I hereby hold that:

1. The Mortgage of Certificate of Title number 186099/45 is hereby declared illegal;
2. Costs of this suit be borne by the defendants with the exception of the 4th defendant.

Order accordingly.




T. N. MWENEGOHA

JUDGE

10/12/2021