IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 834 OF 2018

LYIDYA P. JULIUS SWAI.....APPLICANT

VERSUS

THE MANAGER,
INTERNATIONAL COMMERCIAL BANK (T) LTD.....1ST RESPONDENT

WILLIAM AMANIEL SHAYO..... 2ND RESPONDENT

JOSEPH NYAUCHO,
THE MANAGING DIRECTOR
NYAKI CONSTRUCTION LIMITED.....3RD RESPONDENT

TAMBAZA AUCTION MART
AND GENERAL BROKER.....4TH RESPONDENT

SHIRLEY JULIUS SWAI.....5TH RESPONDENT

Last Order: 21/05/2021
Ruling: 28/05 /2021

R U L I N G

MANGO, J.

Before me is an application objecting sale of landed property situated at Plot No. 82 Block 44 with certificate of title No. 186245/82 Kijitonyama Area, Kinondoni Dar es salaam in realization of a mortgage created by the 5th respondent in favour of the 1st respondent. The application is by way of

Chamber Summons supported by an affidavit sworn by LYDYA PATRICK JULIUS SWAI, the applicant. The application is contested by the 1st respondent who filed a counter affidavit to that effect.

It is alleged that, the suit land is a matrimonial property of the applicant and the 5th Respondent. In the year 2012, the 5th respondent mortgaged the suit property to secure a loan of Tshs. 100 Million from the 1st Respondent without knowledge and consent of the applicant who is the lawful wife of the 5th respondent. The said loan was advanced to the 2nd, 3rd and 5th respondents. The trio defaulted in paying the loan. The 1st Respondent filed Land Case 183 of 2012 which was held in favour of the 1st respondent. The applicant became aware that their house was mortgaged when a notice for sale of the suit property was affixed on the suit house by the 4th respondent in execution of a decree in Land Case No. 183 of 2012.

The Applicant was represented by Ms. R.T.D. Makalle learned advocate, while the 1st respondent had legal services of Mr. Richard Madibi learned advocate, the 2nd, 3rd, 4th and 5th respondents prosecuted the application in person. The 2nd, 3rd, 4th and 5th respondents did not file counter affidavits which means they do not contest the applicant's application. They only provided an alternative security for the loan however, the alternative security was not accepted by the 1st respondent for reasons best known to the parties themselves.

On 11th December 2021 this Court ordered the application to be argued by way of written submission. Only the Applicant and the 1st respondent complied with the Court Order. As indicated earlier that the remaining respondents do not contest the applicant's application, therefore, I proceed to

determine the application by considering submissions made by the applicant and the 1st Respondent.

The applicant counsel submitted that for a mortgage of a matrimonial property to be valid, spousal consent must be secured as required by section 59(1) of the Law of Marriage Act, [Cap. 29 R. E. 2019] and section 112(3) of the Land Act, [Cap. 113 R. E. 2019]. She argued that the applicant is a lawful wife of the 5th respondent as evident from the certificate of marriage annexed as annexure LPJS-1 to the affidavit filed in support of this application.

The applicants counsel disputes existence of marriage between the 5th respondent and one Amina Athumani Fupi on the reason that there is no certificate of their marriage attached to counter affidavit of the 1st Respondent. She considers the alleged to be spousal consent signed by Amina Athumani Fupi to be a mere move by the 2nd, 3rd, and 5th respondents to fulfill the requirements of the provisions of Section 112(3) of the Land Act, [Cap. 113 R. E. 2019].

In his reply submission, counsel for the 1st Respondent highlighted what he considers to be necessary issues to be determined in this application. According to him the following issues need to be determined;

i. Whether the applicant is the lawful wife of the 5th respondent
ii. Whether she has any interest in the suit property and her consent was necessary
iii. Whether the 1st respondent did due diligence in obtaining spousal consent
iv. Whether the mortgage was lawful
v. What reliefs are parties entitled to

Submitting on the first issue, counsel for the 1st Respondent argued that there is no evidence that the applicant is the lawful wife of the 5th respondent as the purported to be their marriage certificate does not bear the names of the applicant and the 5th Respondent. The names that appear in the marriage certificate attached to this application are LYDIA PATRICK SALVI while the applicant name is LYDIA PATRICK JULIUS SWAI. The husband name appears to be JULIUS W.D. SWAI while the mortgagor's name is SHIRLEY JULIUS WILLY SWAI. He is of the view that, the names in the marriage certificate does not refer to the applicant and the 5th Respondent.

On whether the applicant has any interest over the suit property and her consent was necessary, the learned counsel argued that the applicant has no established interest over the suit property and that she is not a spouse of the mortgagor thus, her consent was not required. The lawful wife of the 5th respondent, Amina Athumani Fupi consented to the mortgage thus, the mortgage is lawful.

In her rejoinder, the applicant's counsel submitted that the issue whether the applicant is the lawful wife of the 5th respondent has been vastly and expressly stated in paragraph four of the affidavit and the marriage certificate. She reiterated her concern on the validity of the spousal consent granted by one Amina Athumani Fupi. In this, she argued that the 1st respondent's failure to produce a marriage certificate between the 5th Respondent and the said Amina Athumani Fupi indicates that the 1st Respondent has not conducted due diligence before creating the mortgage. It also establishes that there is no marriage that was contracted between Amina Athumani Fupi and the 5th Respondent.

On whether the applicant has any interest over the suit land, counsel for the Applicant is of the view that the applicant, by virtue of her marriage to the 5th Respondent has interest over the suit land. She cited section 59(1) of the Law of Marriage Act as a law that establish interest of a spouse in a matrimonial property and section 112(3) (a) & (b) of the Land Act as the law that requires spousal consent before creation of a mortgage.

On whether the 1st Respondent conducted due diligence in obtaining spousal consent, the learned counsel submitted that the 1st respondent did not conduct due diligence before creation of the mortgage. To support her opinion, she submitted that the 1st Respondent did not assess the authenticity of the spousal consent and particulars of marriage. According to the applicant's counsel, the spousal consent signed by Amina Athumani Fupi has much defects. She mentioned among the defects to be failure to indicate specific office where the marriage was contracted and the type of marriage together with failure of the 1st Respondent to produce a copy of a marriage certificate between the said Amina Athumani Fupi and the 5th respondent.

She submitted that the mortgage created is not lawful for lack of spousal consent. She submitted further that lack of valid spousal consent is also supported by the actions of the 2nd, 3rd and 5th Respondent in this application. The 2nd, 3rd and 5th respondent did not contest the applicant's application and they went further to seek settlement of the matter by providing alternative property to be realized to settle the outstanding loan amount and other dues attached to the suit property. All these establish that the applicant was not aware of the mortgage and she deserve to have prayers contained in the chamber summons granted.

I have considered submissions by both parties and court record. From the submissions made by both parties the following facts are not disputed:-

i. That the 2nd, 3rd and 5th respondents were granted a loan of Tshs 100 Million by the 1st respondent
ii. That the 5th Respondent mortgaged his house located at Plot No. 82 Block 44, with certificate of title No. 186245/82 Kijitonyama area, Kinondoni Dar es Salaam as security for the loan
iii. That the mortgaged property is the matrimonial property of the 5th respondent and his spouse
iv. The 5th respondent mentioned one Amina Athumani Fupi to be his legal wife
v. That the said Amina Athumani Fupi signed a spousal consent in respect of the mortgage created by 5th respondent in favour of the 1st respondent
vi. That the Applicant was not aware nor did she consent to the mortgage created
vii. The 2nd, 3rd, and 5th respondent defaulted in paying the loan
viii. The 1st respondent instituted Land Case No 183 of 2012
ix. The case was held in favour of the 1st respondent
x. That in the course of execution of the court decree in Land Case No. 183 /2012, the 4th respondent was appointed to sale the suit house

The only issues that need to be determined in this case is whether the applicant is the lawful wife of the 5th Defendant and whether the 1st respondent conducted due diligence before the mortgage was created.

In proving her marriage to the 5th Respondent, the applicant attached a marriage certificate No. 004 issued on 3rd April 1995. According to the marriage certificate, parties to the marriage are JULIUS W.D SWAI AND LYIDYA PATRICK SALVI. In this application, the applicant presented herself to be LYIDYA PATRICK JULIUS SWAI. Certificate of title of the suit property is registered in the name of SHIRLEY JULIUS WILLY SWAI.

As correctly noted by the counsel for the 1st respondent, the applicant has not produced any evidence to establish that the names LYIDYA PATRICK JULIUS SWAI has connection with the name LYDYA PATRICK SALVI and whether the two sets of names refer to a single person. Moreover, the mortgagor of the property in dispute is not JULIUS W.D. SWAI or PATRICK WILLIBAD DANIEL SWAI as it appears in the marriage certificate attached by the applicant. The certificate of title and a copy of spousal consent attached to the 1st Respondents counter affidavit indicates that the owner and mortgagor of the suit property is SHIRLEY JULIUS WILLY SWAI. The applicant did not establish any connection between her husband's name as it appears in the marriage certificate, JULIUS W. D. SWAI and SHIRLEY JULIUS WILLY SWAI the 5th respondent.

I am of a considered view that the names SHIRLEY JULIUS SWAI do not refer to JULIUS W D SWAI as the two sets of names suggest to be referring to two different persons. In such circumstances there is no evidence that the 5th respondent is married to the applicant. The applicant managed to prove that LYIDYA PATRICK SALVI is married to one JULIUS W.D SWAI or WILLIBAD DANIEL SWAI who is not a registered owner of the suit property.

On 21st May 2021, few days before delivery of this ruling, counsel for the Applicant informed the Court on the death of the 5th respondent. She produced a burial permit to prove death of the 5th Respondent. The burial permit produced as a proof of the alleged death indicates that the person who passed away is JULIUS SWAI and not the 5th respondent, SHIRLEY JULIUS WILLY SWAI.

The basis of this application was the alleged marriage between the applicant and the 5th respondent, SHIRLEY JULIUS WILLY SWAI. It was the applicant who alleged to have married the 5th respondent. The law, Section 110 (1) of the Evidence Act, [CAP. 6 R. E. 2019] vests the burden of proof to the party claiming right or liability that depends of existence of any fact. The section reads;

> "*Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*"

The applicant desires this court to declare the mortgage of the suit land unlawful for lack of her consent as a spouse of the 5th respondent. In order to successfully claim such rights, she ought to have proved existence of the alleged marriage. It is existence of the alleged marriage that would have made 1st respondent bound to obtain the applicant's consent before creation of the disputed mortgage. Failure of the applicant to prove existence of her marriage to the 5th respondent makes the applicant incapable of claiming any right over the suit property as a spouse of the 5th respondent.

For that reason, I find this application to be unmeritorious and it is hereby dismissed with costs.

Z. D. MANGO
JUDGE
28/05/2021