

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

HC. LAND CASE NO.379 OF 2017

ELIZABETH SOLOMONI MBWILO PLAINTIFF

VERSUS

EMMANUEL PIUS MSEKWA 1ST DEFENDANT

KEFAD COMPANY LIMITED 2ND DEFENDANT

KENYA COMMERCIAL BANK PLC 3RD DEFENDANT

MEM AUCTION MART & GENERAL BROKERS LTD4TH DEFENDANT

SAID MAHSEN SAID 5TH DEFENDANT

JUDGMENT

Date of the last Order: 20.09.2021

Date of Judgment: 29.09.2021

A.Z. MGEYEKWA, J

This suit was lodged before this court by the Plaintiff herein Elizabeth Solomoni Mbwilo against the Defendants herein Emmanuel Pius Msekwa, Kefad

Company Limited, Kenya Commercial Bank Plc, Mem Auction Mart & General Brokers Ltd and Said Mahsen Said. The Plaintiff is claiming against the defendants jointly and or severally as follows_

- (a) A declaratory orders that the 1st Defendant obtained and transferred the property of the Plaintiff at Plot No.290, Title No. 186150/2 Regent Estate Dar es Salaam into his name fraudulently.*
- (b) A declaration order that all other transactions including sale of the Plot No. 290, Title No. 186150/2 Regent Estate Dar es Salaam mortgage transaction of the said property to secure the loan and auction of the same was illegal and void ab initio.*
- (c) A declaration Order that the Plaintiff is the lawful owner of the property at Plot No. 290, Title No. 186150/2 Regent Estate Dar es Salaam.*
- (d) A declaration Order that the 3rd and 5th Defendants or any other person/institution acting under them to immediate surrender the original Title Deed No. 186150/2 Regent Estate Dar es Salaam to the Plaintiff.*
- (e) An Order for rectification of the land register to de register the Plaintiff herein as legal owner of the property at Plot No. 290, Title No. 186150/2 Regent Estate Dar es Salaam.*

- (f) An Order for discharge of mortgage created in respect of the property in dispute.*
- (g) That the Defendants be ordered to pay the Plaintiff and aggregate of Tshs. 100,000,000/= (One Hundred Million only) as general damages.*
- (h) Costs of the suit; and*
- (i) Any other relief (s) as the court may fit and just to grant.*

A brief background of the suit as obtained from the record of the case is that the Plaintiff is claiming against all the Defendants jointly and severally for declaration that the transaction done by both Defendants form disposition, mortgaging and auction was void, taking into account that the 1st Defendant herein stole her original Title Deed No. 186150/2, Plot No. 290, Title No. 186150/2 Regent Estate Dar es Salaam and fraudulently forged the transfer documents into his name and later without any colour of right used the same to guarantee the 2nd Defendant herein to get a loan from the 3rd Defendant who as well issued the same without thorough search to establish the owner of the property and later the 4th Defendant under the instructions of the 3rd Defendant auctioned the property to the 5th Defendant herein.

The Plaintiff claimed that in September, 2017, she was surprisingly informed by her tenants that her house situated at Plot No. 290 with Title No. 186150/2, Regent Estate Dar es Salaam has been sold by the bank after failure to service the loan which was not within her knowledge. The Plaintiff perused her documents and discovered that her original title deed was missing from where she kept. The Plaintiff asked the 1st Defendant, he denied to know anything about the title deed. It is the Plaintiff that Plaintiff took efforts to ask the bank which was involved in the loan, the person who used her title to secure the loan, the auctioneer of her property and the buyer of her property. The Plaintiff discovered that the 2nd, 3rd, 4th and 5th Defendants herein. The Plaintiff's Title Deed was used by her son to guarantee the 2nd Defendant to secure Tshs.350,000,000/= as a loan which the 2nd Defendant defaulted. The Plaintiff claimed that the 1st Defendant forged documents and transferred the Plaintiff's Title Deed into his name and he used the Title Deed to guarantee the loan taken by the 2nd Defendant from the 3rd Defendant's bank.

The Plaintiffs claims further that the auction had no colour of right due to the fact that the owner of the property was not involved at all due to the fact that she was not aware that her Title Deed was transferred. The Plaintiff went on

to claim that she has instituted a criminal proceedings against the 1st Defendant since 20th September, 2017.

The Plaintiff claims that the Defendants unlawful act has caused her to suffer great inconveniences and embarrassment. The Plaintiff therefore demands Tshs. 100,000,000/= as general damages.

In their Plaint, the Plaintiff prays for Judgment and Decree against the defendant as follows:-

- a) A Declaration Order that the 1st respondent obtained and transferred the property of the plaintiff at Plot 290, Title No. 186150/2 Regent Estate Dar es Salaam into his name fraudulently.*
- b) A Declaration Order that all other transactions including sale of the Plot No. 290, Title No. 186150/2 Regent Estate Dar es Salaam mortgage transaction of the said property to secure the loan and Auction of the same was illegal and void ab initio.*
- c) A Declaration Order that the plaintiff is the lawful owner of the property at Plot No. 290, Title No. 186150/2 Regent Estate Dar es Salaam.*

- d) *A Declaration Order to 3rd and 5th Defendants or any other person/institution acting under them to immediate surrender the original title deed No. 186150/2, Plot No. 290 Regent Estate Dar es Salaam to the plaintiff.*
- e) *An Order for rectification of the land register to de – register the plaintiff herein as legal owner of the property at Plot No. 290, Title No. 186150/2 Regent Estate Dar es Salaam.*
- f) *An Order for discharge of mortgage created in respect of the property in dispute.*
- g) *That the Defendants be ordered to pay the plaintiff an aggregate of Tshs 100,000,000/= (One Hundred Million Only) as general damages.*
- h) *Costs of this suit; and*
- i) *Any other relief(s) as the Court may deem fit and just to grant.*

On the other hand, all five Defendants, in response to the Plaintiff's claims, have 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 learned sister, Hon. Mgonya, J, my learned brother; Hon. Mallaba, J and my learned brother Hon. Maige, J. Hon. Maige, J

conducted the 1st Pre-Trial Conference and my learned sister Hon. Madeha, J conducted Mediation. 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. Bashiri, learned Advocate, while the 1st Defendant enjoyed the legal service of Sande Msoni, learned counsel, the 2nd Defendant enjoyed the legal service of Ms Aziza Msangi, learned counsel, the 3rd and 4th Defendants enjoyed the legal service of Mr. Elisa Msuya assisted by Irene Mshomari, learned counsel and Ndehorio Ndesamburwa. The 5th Defendant enjoyed the legal service of Elipafrai Abdallah, learned counsel.

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

- 1) *Whether the 1st Defendant legally acquired and transferred the CT No. 186159/2 Plot No. 260 Regent Estate Dar es Salaam from Plaintiff to himself.*

- 2) *Whether the mortgage created by the 1st Defendant is favour of the 3rd Defendant to secure the 2nd Defendant in respect of the property on CT No. 186159/2 Plot No. 260 Regent Estate Dar es Salaam was fraudulently procured.*
- 3) *Depending on the answer to issue (1) herein above, whether sale of the mortgaged property (CT No. 186159/2 Plot No. 260 Regent Estate Dar es Salaam is lawful.*
- 4) *To what other reliefs are 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 affidavits of his witnesses before or by 8th April, 2021 and the Defendants filed their affidavits on 29th April, 2021, cross examination and tendering of documents was schedule on 25th and 28th May, 2021.

To prove the above issues, the Plaintiffs' side had one witness, Ms. Elizabeth Salomon Mbwilo, who testified as **PW1**. The 1st Defendant called one witness; Mr. Emmanuel Pius Msekwa, who testified as **DW1**. The 2nd

Defendant called one witness. Mr. Dickla Lutangilo Ng'ondya who testified as **DW2**. The 3rd and 4th Defendants called one witness Hamimu Kibwana Gamba who testified as **DW3**. The 4th Defendant called one witness Abraham Mahsen who testified as **DW4**.

By the consent of the parties, on 15th September, 2021 both learned counsels filed their Final Written Submissions whereas both counsels complied with the court order.

The Plaintiff's side tendered one (1) documentary Exhibits to wit; Plaintiff's affidavit, it was admitted by this Court and marked as **Exhibit P1**. The 1st Defendant tendered one (1) documentary Exhibit to wit; a 1st Defendant's affidavit that was admitted and marked as **Exhibit D1**. The 2nd Defendant tendered one (1) documentary Exhibit to wit; a 2nd Defendant's affidavit that was admitted and marked as **Exhibit D2**. The 3rd Defendant tendered (11) documentary Exhibit to wit; the 3rd Defendant affidavit that was admitted and marked as **Exhibit D3**. A Banking Facility was admitted by this Court and marked as **Exhibit D4**. A Mortgage of a Right of Occupancy was admitted by this Court and marked as **Exhibit D5**. A Marriage affidavit was admitted by this Court and marked as **Exhibit D6**. A personal Guarantee and Indemnity

was admitted by this Court and marked as **Exhibit D7**. An Affidavit to create a Mortgage was admitted by this Court and marked as **Exhibit D8**. A Certificate of Board Resolution of the Company was admitted by this Court and marked as **Exhibit D9**. A Banking Facility was admitted by this Court and marked as **Exhibit D10**. A Default Notice was admitted by this Court and marked as **Exhibit D11**. A Certificate of Sale was admitted by this Court and marked as **Exhibit D12**. A Witness Statement was admitted by this Court and marked as **Exhibit D13** and a Certificate of Title was admitted by this Court and marked as **Exhibit D14**.

In her effort to prove her case the Plaintiff who paddled his own canoe in this matter appeared in Court and through her affidavit which was adopted by this court she testified as follows; she is the lawful owner of a landed property with a Certificate of Title No. 186159/2 located at Plot No. 260 Regent Estate Dar es Salaam. It was her further testimony that her title deed was missing, she asked her son, DW1 who denied to know anything about the missing title deed. It came to her knowledge that the Kenya Commercial Bank of Tanzania and the 4th Defendants were involved in auctioning the said property. PW1 went on to testify that DW1 guaranteed one KEFAD limited to raise a sum of

Tshs. 350,000,000/= as a third party mortgage and later the guaranteed defaulted. In her evidence, PW1 mentioned that 1st Defendant transferred the title deed from her name to his name and the loan was guaranteed to the 2nd Defendant, after consulting his son he did escaped to meet her. There is a criminal case against the 1st Defendant and the matter is still under investigation. Finally, she prayed for the judgment and decree against both defendants.

When PW1 was cross examined, she testified that her claim is to recover her house located Plot No. 260 Regent Estate Dar es Salaam. PW1 stated that she does not know the 2nd Defendant and have no any case against him. She admitted that the 1st Defendant is her only child who is not a thief. She said that the property in question belongs to her and his son will be the heir.

It was PW1 further testimony that she does not know the 5th Defendant who passed away. She claimed that the 3rd and 4th Defendants have auction her house. In her testimony, PW1 insisted that she wants her house back and does not want her son to go to prison.

DW1, Emmanuel Pius Msekwa, in his testimony admitted that he and the 2nd Defendant transferred the title deed from his mother's name to his name. When he was cross examined, he said that he signed the bank documents twice as a guarantor. DW1 admitted that the wording appearing in the Written Statement of Defence and his statement are not the same. He testified that in his affidavit he admitted to have forged the documents. He testified that he has no nay case against the 2nd Defendant. He went on to testify that he is the one who prepared the WSD but he involved a lawyer in drafting the Written Statement of Defence. He denied to have stolen the Plaintiff's title deed. DW1 testified that he was facing a criminal case and was accused for stealing the title deed. He said that he did not inform the Bank that he forged the transfer deed.

He testified that he was in possession of the title since 2013. DW1 admitted to have signed the Mortgage Deed and the bank facility letter and was served with a default notice. DW1 testified that he has no any evidence to prove that the 2nd Defendant was involved in transferring the title deed but insisted that DW2 participated in the transfer process. He continued to testify that the mortgage was a security and the Bank was right to sell the property since they

owned the 2nd Defendant. DW1 said the Plaintiff did not obtain any loan from the bank. He testified that he does not object the Plaintiff to recover her property.

Dickla Lutangilo Ng'ondya testified as a second Defendant, He testified that DW1 joined the Company as a Director and shareholder with a 5% company shares. He testified that in 2015, he obtained a loan in a tune of Tshs. 350,000,000/= as a Director of the Company by using the title deed. He testified that before there was a previous loan in tune of Tshs. 240,000,000/= which was obtained by DW1 in 2014, the mortgage facility was Plot No. 952 Mbezi Kawe bearing the names of Dickla Ng'ondya and Cresilda Dickla Ng'ondya. He testified that he was required to service the loan for 5 years.

DW2 continued to testify that the second loan was secured by Plot No.290 Regent Estate Dar es Salaam and the same was added to the first loan. DW2 testified that the Bank wanted to sell both securities the secured property Plot No. 952 was not sold because they lodged a caveat and they managed to restructure the loan the same is ongoing. DW2 denied that he was involve in transferring or forging the title deed. DW2 testified that the Bank announced the sale of both securities but he took effort to lodge a caveat while DW1 did

not want to negotiate with the Bank. DW2 testified that the DW1 is no longer a Director of KEFAD Company Ltd.

DW2 continued to testify that a facility letter dated 2016 was issued to KEFAD Company. He denied to have been involved in transferring of title, the transfer took place in 2013 and he did not know what transpired in 2013. DW2 testified that there is no any evidence to prove that he was involved in transferring the title deed. Insisting, DW2 testified that DW1 is the one who mortgaged the Plot No. 290 and signed the documents such as Notification of Registration and the affidavit bears his name and picture. He added that the Bank issued a Guarantee personal indemnity document and DW1 guaranteed the Bank.

DW3, introduced himself as a Debt Recovery Manager of KCB since 2016. He testified to the effect that he is the custodian of debts accounts. In his testimony he testified that KEFAD Limited took a loan in a tune of Tshs. 350,000,000/= secured by two properties; Plot No. 290 located Kinondoni Municipality and a factory located at Kawe which secured a loan in a tune of Tshs. 428,000,000/=. The 3rd Defendant testified to the effect that the 1st Defendant entered into an agreement with Bank. To reinforce his testimony,

DW4 tendered a Banking Facility, a Mortgage of a Right of Occupancy, a Personal Guarantee and Indemnity an Affidavit to create a Mortgage and a Certificate of Board Resolution of the Company.

The 5th Defendant in his testimony had not much to say than to testify that he is the lawful purchaser of the house located on Plot No.290, Regent Estate which is registered under CT No. 186150/2. He testified that the suit landed property came into possession of the late Said Mahsen Said by public auction conducted by the 4th Defendant after the 1st Defendant defaulted to repay the loan facility and he emerged a successful buyer. The 5th Defendant testified that he paid in full the purchase price and initiated the transfer process to shift the ownership of the disputed property from the previous registered owner to his name.

Having heard the testimonies of both parties and considering the final submission of all learned counsels, I should state at the outset that, in the course of determining this case I will be guided by the principle set forth in civil litigation and which will guide this Court in the course of determining this suit. The said principles include the following; the same is stipulated under section 110 of the Evidence Act, Cap.6 [R.E 2019] which places the burden of proof

on the party making the assertion which that partly desires a Court to believe him and pronounce judgement in his favour. Section 110 (1) of the Evidence Act Cap.33 [R.E 2019] provides that:-

"110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of ant fact, it is said that burden of proof lies on that person."

Similarly, in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113 it was held that "he who alleged must prove the allegations".

Another salient principle of the law, which are applicable in civil litigation and which will guide this Court in the course of determining this suit is "Parties are bound by their pleadings." Pleadings in this sense include the Plaint, Written Statement of Defence, affidavits and reply therein if any. Therefore, in its broader meaning pleadings include all documents submitted and annexed thereto and those which were listed along with the plaint or produced before the first date of hearing of the suit. The Court is required and expected to

examine the entire pleadings and the totality of evidence tendered, together with assessment of the credibility of the witnesses who appeared before the Court. Evidence adduced before the Court must be weighed and not counted.

In resolving the controversy before me, the above underlying principles, case laws shall guide my evaluation and analysis of the evidence that was presented by parties in this suit, pleadings together with the final submissions by the learned counsels and with earlier framed issues by the court will be resolved seriatim:

I choose to dispose of this matter following the order in which the issues were framed. I will tackle the first and second issues in a combined fashion. These issues intend to ascertain whether the 1st Defendant legally acquired and transferred the CT No. 186159/2 Plot No. 290 Regent Estate Dar es Salaam from Plaintiff to himself and whether the mortgage created by the 1st Defendant in favour of the 3rd Defendant to secure the 2nd Defendant in respect of the disputed plot was fraudulently procured.

The Plaintiff is claiming that her CT No. 186159/2 Plot No. 290 Regent Estate Dar es Salaam was stolen from her and the same was transferred into Emmanuel Pius Msekwa's name. In other words she associated the transfer

of the said certificate of occupancy with fraud, that it was fraudulently transferred from her name to the 1st Defendant.

The 1st Defendant in his sworn statement specifically on paragraph 11 stated that he agreed to transfer the Titled Deed of the suit property to his name to secure the loan. DW1 did not mention whether the Title Deed was transferred from the Plaintiff's name to his name. Bewildering, the 1st Defendant in his written statement of defence specifically on paragraph 8 disputed the content on paragraph 13 appearing in the Plaint. For ease of reference he reproduce paragraph 8 of the 1st Defendant Written Statement as hereunder: -

"...the arrangement to transfer the ownership of suit property were consented and conducted by Plaintiff and the 1st Defendant."

Moreover, on paragraph 12 of the Written Statement of Defence the 1st Defendant disputed the content of paragraph 7 of the Plaint and stated that:

"...the signatures and any other endorsement appearing in any of the disputed transaction are genuine and there was no any evil mission planned, whatsoever."

The 1st Defendant continued on paragraph 13 of his Written Statement of Defence to state that:

“The transaction were not fraudulently and not illegal act was committed.”

The 1st Defendant disputed all the claims against him which means the Plaintiff consented the transfer of the certificate of title from her name to his name. When he was cross examined he admitted that he fraudulently transferred the Plaintiff's Certificate of Occupancy from the Plaintiff's name to his name in order to obtain a loan. He claimed that he and the 2nd Defendant aimed to raise funds thus they agreed to transfer the Title Deed from the Plaintiff's name to his name. The pleadings reveals that the 1st Defendant was untrustworthy witness. His evidence was inconsistency. In the case of **Emmanuel Abraham Nanyaro v Peniel Ole Saitabau** [1987] TLR 47 the Court of Appeal of Tanzania held that:-

“ Unreliability of witness conflicts, inconsistencies in their evidence entitle judge to reject evidence”

Applying the above authority in the instant case, the inconsistency testimony of the 1st Defendant is rejecting. Therefore, as long as there is no any proof that the disputed landed property was illegally acquired and transferred the same remains as that the 1st defendant legally acquired and transferred the CT No. 186159/2 Plot No. 290 Regent Estate Dar es Salaam from Plaintiff to himself. The 1st Defendant does not deny that, he and the 2nd Defendant borrowed Tshs. 350,000,000/= from the 3rd Defendant. In the 1st Defendant's own words, testified to the effect that he was aware of the mortgage and he facilitate the creation of the said mortgage by securing the 2nd Defendant's loan. 1st Defendant also was well informed by the 3rd Defendant of the public auction. In his own words he admitted that when the public auction was conducted he was still indebted. The 1st Defendant admitted to have been in default for some months when the security was auctioned. The reasons he offered for the default was that, they encountered business hardships rendering him and the 2nd Defendant to fail repaying the debt as per terms of the agreement

On that account, the evidence on record establish that the agreement between the 1st Defendant and the 3rd Defendant was binding and enforceable.

As rightly pointed out by Mr. Msuya in his final submission that the 1st Defendant signed the agreement (Exh.D4 and Exh.D10) freely. The principle of sanctity of contracts as stipulated under section 37 of the Law of Contract, Cap. 345 [R.E 2019] provides that:-

"37 (1) The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law."

The Court of Appeal of Tanzania in a recent case of **Agatha Mshote v Edson Emmanuel & 4 Others**, Civil Appeal No. 121 of 2019 delivered on 20th July, 2021 held that:-

"It is settled law that parties are bound by their own pleadings and that a party shall not be allowed to depart from his pleadings to change its case from what was originally pleaded. This entails a party parading the evidence to prove or support what he has pleaded ..."

Applying the above provision of law and in the circumstances, it is my considered opinion that the 1st Defendant was bound by the terms and conditions of the agreement he entered with the 3rd Defendant.

The Plaintiff is disputing the mortgage landed property which was used to secure the loan in a tune of Tshs. 350,000,000/= and challenging the disposition of transfer. She is blaming or shifting the burden to prove to the 2nd Defendant 3rd and 4th Defendants who in my view are not proper parties to prove whether there was an approval of transfer. The Abdulrahim Mhsen Said, the administrator of the Estate of the late Said Mahsen Said, 5th Defendant was a bona fide purchaser who is stranger does not lose his title to the property merely because there was fraud, misrepresentation, irregularities or subsequent reversal or modification of the decree. Instead his right over the suit property is protected.

The rationale behind the protection of a bona fide purchaser for value was aptly stated by the Court in the case of **Peter Adam Mboweto v Abdallah Kulala and Mohamed Mweke** [1981] T.L.R 335, it was held that:-

“If a reversal of decree would invalidate sale, there would be less inducement in any intending purchaser to buy at an auction sale thus depreciating sale prices and there will also be no degree of certainty as a purchaser cannot be expected to a behind a judgment to inquire into irregularities in the suit”.

Likewise, in the case of **John Bosco Mahongoli v Imlida Zakaria Nkwira and 2 Others**, Land Appeal No. 101 of 2016 this court held that:-

“ Under the law the rights of bonafide purchaser have to be protected”

On this conclusion, I feel irresistible to associate myself with the persuasive decision of the Court of Appeal of Tanzania in the case of **Godebertha Rukanga v CRDB Bank and Others**, Civil Appeal No. 25 /17 of 2017 held that:-

“ In the circumstances, being a bona fide purchaser for value, and because there was no evidence of fraud or misrepresentation by the mortgagee, the 4th Respondent’s right over the suit property is legally protected...”

To prove that the mortgage was legally executed, the recovery Manager of the Kenya Commercial Bank, the 3rd Defendant tendered several documentary evidence; loan agreements, offer letter, bank facility letter. To mention the few. The 1st Defendant did not dispute that he signed the bank documents. It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of law of contract that there should be a sanctity of the contract as lucidly stated in the case of **Abuay**

Alibahai Azizi v Bhatia Brothers Ltd [2000] TLR 288. As long as the second Defendant entered into an agreement freely with sound mind with the 3rd Defendant and the agreement had all attributes of a valid contract means the 3rd Defendant admitted the liabilities and at the time when he entered into the agreement.

Applying the above analysis, it is my considered view that, it was wrong for the Plaintiff to come before this court without proving that the Certificate of Title was stolen from her possession. Taking to account that the 1st Defendant who is her own son has stated that the Plaintiff was aware of the transfer process. The mortgage presented to the Bank contained the 1st Defendant's name, the person who guaranteed the 2nd Defendant loan. The same means the Plaintiff had no *locus standi* to institute this suit. As rightly pointed out by Mr. Msuya learned counsel for the 3rd and 4th Defendants, the allegations of fraud according to case law precedents standard of proving fraud in civil proceedings is higher than the ordinary balance of probabilities. The Plaintiff was not able to discharge this burden.

As I pen off, I find it pertinent to address the issue raised by the Plaintiff's Advocate, Mr. Bushiri in his final submission submitted that the 3rd Defendant

did not conduct any official search to find out whether the Defendant was a proper owner of the suit property. The Plaintiff and learned counsel for the Plaintiff and in their testimony and submission admitted that transfer was made therefore it is upon the Plaintiff to prove whether the transfer was fraudulently made. She was in position to involve or sue the Registrar of Title and Commissioner for Land to ascertain whether the transfer was lawfully or otherwise.

I will now direct my mind to the third issue that *depending on the* answer to issue (2) herein above, whether sale of the mortgaged property CT No. 186159/2 Plot No. 290 Regent Estate Dar es Salaam is lawful. Having determined the 2nd issue at length, it is my considered view that the 2nd issue has answered the 3rd issues that if the mortgage was lawful executed then even the sale of the mortgaged property was lawful. The 3rd and 4th Defendants proved that the suit landed property was lawful sold to the 5th Defendant by producing a default notice dated 5th May, 2017 (Exh.11) and after three months the auction took place. To substantiate his testimony DW3 tendered a certificate of sale dated 4th August, 2017 (Exh.P12). The 1st Defendant admitted to receive a default notice, instead of taking legal action he remained

silent and the property which is in his name was sold by the 4th Defendant to the 5th Defendant and 3rd Defendant did not fault the 4th Defendant in selling the said property since the loan was not serviced.

In relation to the 4th issue *to what other relief (s) are parties entitled.* Following determination of the first three issues in the negative, i.e. in favor of all the defendants, it follows therefore that, the third issue should be answered, as I hereby do, in the negative. As pointed out earlier in selling the mortgaged suit farm, the 3rd Defendant exercised his legal right under section 126 of the Land Act, 1999. The 3rd Defendant was also enforcing the agreement signed by the 1st Defendant and the 3rd Defendant. The Defendant was aware that in case he will default then the mortgage property will be sold.

In order the Plaintiff to be rewarded and the mortgage property be returned to her she had a duty of proving wrongfulness of the defendants conduct. Damages in the nature claimed by the Plaintiff cannot arise from a claim where the mortgage property was in the name of the 1st Defendant. The claims for fraudulently transfer of title deed was not proved. The Plaintiff's claims are upon his son whose testimony was shaky.

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 29th September, 2021.




A.Z.MGEYEKWA
JUDGE
29.09.2021

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




A.Z.MGEYEKWA
JUDGE
29.09.2021

Right to appeal full explained.