

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO 81 OF 2019

HADIJA HEMED PLAINTIFF

VERSUS

LUGANO ANGETILE MWAKYOSI

JENGELA.....1ST DEFENDANT

LUDEMI TRADING CO. LIMITED.....2ND DEFENDANT

EQUITY BANK (TANZANIA) LIMITED.....3RD DEFENDANT

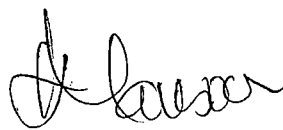
ALI HAMAD HAMAD.....4TH DEFENDANT

KHATIB SAID HAJI.....5TH DEFENDANT

JUDGEMENT

DATE OF JUDGEMENT- 17TH /NOVEMBER/2021

Hadija Hemed, the plaintiff herein, is the wife of Ali Hamad Hamad, the 4th defendant in the suit. Ali Hamad Hamad had two wives, the first wife was Fatuma Mohamed Salum, and the 2nd wife is Hadija Hemed. The suit was originally filed by the two wives i.e., Fatuma Mohamed Salum as the 1st plaintiff and Hadija Hemed as the 2nd



plaintiff. The first plaintiff died, and on 20 September 2021, the Court made an entry that Fatuma Mohamed Salum who was the plaintiff in the suit is dead, she died on 1st May 2021, and the right to sue survived to the surviving plaintiff, who is the co-wife serving the same interest. The Court ordered the suit to proceed at the instance of the surviving plaintiff only, and so the name of Fatuma Mohamed Salum was removed from the suit.

Briefly, the facts of the case are that, the 2nd defendant was granted a loan of TZS 300,000,000 by the 3rd defendant. As security for the loan, the 4th defendant mortgaged his property known as Plot No. 1619/1 & 1621, Block A, comprised under a Certificate of Title No 40781, Buguruni Area, Ilala, Dar es Salaam, herein shall be referred to as "the Suit Property". The 4th defendant also gave his Personal Guarantee and Indemnity. The 4th Defendant also made a Declaration under Oath that the Suit Property is not the Matrimonial home and therefore there is no third party (s) holding interest in the property, thus he pledged the suit property as the sole owner as such no consent from the wife or wives was required.

The 2nd defendant defaulted paying the loan, and so the Suit property was sold to the 5th defendant in a public auction.

The plaintiff, being the wife of the 4th defendant filed a suit claiming that the suit property is the matrimonial property. She alleges that she and her co wife, who is now the deceased lived in the suit premises since they got married, and they have had their children in the same house. She claims that she did not give her consent for the suit property to be mortgaged in favor of the Bank, the 3rd defendant herein, and she claims that the borrower and the bank, who are the 1st, 2nd, and 3rd defendants in the suit acted fraudulently and deliberate for failure to disclose to the 4th defendant that he needed his wives' consent before placing the matrimonial house as security for the loan granted to the 2nd defendant. That her husband, who is the 4th defendant in the suit had informed the 3rd defendant, the bank, that he is married, but still the bank did not bother to get the consents of the wives, and thus the bank acted fraudulently, and the mortgage was invalid.

Thus, the plaintiff filed a suit claiming for the following:

1. The guarantee be rescinded or set aside as it was obtained by fraud.
2. A declaration that the 4th defendant had no legal right to mortgage the suit property without the consent of the plaintiff.
3. A declaration that mortgage of the suit property was illegal ab initio for want of the consents of the wives since it is a matrimonial home.
4. A declaration that the auction of the suit property and sell to the 5th defendant was illegal.
5. Costs of the suit
6. Any other relief the court deems fit to grant.

1st, 2nd, and 4th defendant were all represented by Advocate Malamsha Ambrose. They filed their joint written statement of defense. The defendants admitted having taken the loan from the bank and have also admitted having defaulted paying the loan, hence the mortgaged property being sold for recovery of the loan. The 4th defendant admits having placed his property for securing the loan. They specifically deny under paragraph 6 and

7 of their joint defenses that the house is not a matrimonial property and they required proof from the plaintiff. They all prayed for the judgement to be entered in favor of the defendants with costs.

The 3rd defendant filed a defense resisting the claim from the plaintiff. The 3rd defendant says the 4th defendant gave a declaration under oath stating that the suit property is his sole property, and he owns it under his own name, and it is not a matrimonial home. They say, the 3rd defendant acted under the declaration and since the house was the property of the 4th defendant there was no requirement of a consent of the wife or wives.

The 3rd defendant also avers that all the procedures for auction of the suit property to the 5th defendant was complied with, and the house was sold to the highest bidder in the auction.

The 5th defendant filed his defense stating that he is the Bonafide purchaser of the property as he bought it in the auction

held on 15th May 2016. He was the highest bidder in the auction, and had properly and promptly paid the purchase price.

Pleadings got completed, and during the Final Pre Trial Conference, the following issues were recorded.

1. Whether there was a lawful mortgage of the suit property.
2. To what relief are the parties entitled to.

To prove her case, the plaintiff had herself as the witness. She said she was married to the 4th defendant since 25th April 1983, and the Marriage Certificate was received as evidence and marked as Exhibit P1. She said she has 8 children, and they all live in the suit premises. She also said her husband, the 4th defendant took the title deed and gave it to Lugano, who is the 1st defendant in the suit. That Lugano was the tenant in the suit property having his business in the front side of the house. She said she was surprised to see the house been auctioned. She had no idea what was going on as she was not involved when the house was mortgaged to the bank by her husband.

PW2 was the son of Ali Hamadi, the 4th defendant, his name is Faki Alli Hamadi. He said he knows that the house was auctioned by the bank. That the auctioneers went to the suit premises on Saturday, and they marked the house, and on Sunday the house was auctioned. He seems to fault the auctioning procedures as he says there were no loudspeakers before the auction. He also says that his father, the 4th defendant told them that he had mortgaged the house when he was hospitalized, and as soon as they became aware, they filed a case in court to stop the bank from auctioning the house. He acknowledged that his father, the 4th defendant herein had mortgaged the suit property to secure the loan given to Lugano, the 1st defendant in the suit.

In his defense Lugano Angetile Mwakyosa admitted having taken the loan from the 3rd defendant and admitted having defaulted in paying back the loan. He says he was the tenant in the suit premises, and the 4th defendant had agreed to pledge his house to secure the loan. Lugano said, all the agreements were prepared by the bank, and they all signed. He also said, the wives of Alli Hamadi

were living in the suit property, thus the suit property is the matrimonial property.

Ali Hamadi was DW2. He says the suit property is registered in his name, but his two wives and 19 children are all living in the house. He says Lugano Angetile was his tenant having his business in the front part of the suit premises. Lugano had asked him to guarantee the loan, and he agreed. He said he did not inform his wives or children that he had agreed to guarantee the loan given by the bank to Lugano. That he signed all the agreements prepared by the bank, but he did not know what he was signing. The Agreements and all the forms he signed were written in English, and no one had translated them before he signed them. The 4th defendant pleaded ignorance.

DW3 was the Bank officer Juma Jabir Suleiman. He said, the 2nd defendant was given the loan of TZS 300,000,000 and he signed the Agreement and this Agreement was admitted in evidence as Exhibit D1. The Loan was secured by two houses, one of the houses being the suit premises. The loan was to be repaid by 36 monthly instalments of TZS 11,000,000.00 each. The 4th defendant

agreed to mortgage his house to secure the loan, and the Mortgage Deed was admitted as Exhibit D2.

The 2nd defendant defaulted paying the loan, and despite being given lots of chances to remedy the default, the 2nd defendant continued to default, hence the Bank served the Mortgagor with the Notice of Default which was dated 7th January 2015. The Notice of Default was admitted in evidence as Exhibit D3. As per the Notice, the outstanding debt was TZS 280,838,471 as of 7th January 2015. The 2nd defendant was given more time to repay the loan after the notice but again, he did not remedy the default, and so in 2016 the suit property was sold in a public auction. The Report by the Auctioneer dated 15th May 2016 was admitted in Court as Exhibit D4.

This witness says at the time of mortgaging the suit property all the processes were fully complied with, and no one had resisted or objected the house from being mortgaged. He says, when they went to value the house, they found people in the house, but those people said they were tenants. He said no one of the family or wives of the 4th defendant were residing in the suit property.

Another witness for the Bank was Advocate Gloria Misana. She testified as DW4. She said the 1st and 4th defendants went to her office with documents including the Facility letter and an affidavit. She said she witnessed Ali Hamadi signing the affidavit, and the affidavit of Ali Hamadi was admitted as Exhibit D5. This witness said she read the contents of the affidavit to the 4th defendant and translated it in Kiswahili, and the 4th defendant understood it and had agreed to sign it. The affidavit was to confirm that Ali Hamadi, the 4th defendant herein was the registered owner of the suit property, and that he has agreed to pledge the property as security to secure the loan amounting to TZS 300,000,000 extended to Ludemi Trading Company Limited by the Equity Bank Tanzania Limited. He also declared in the affidavit that he has two wives, but the suit property was not a matrimonial asset.

The 5th defendant (DW5) is the son of Khatib Said Haji, and the administrator of his estates. Khatibu Said Haji died, and his estates are now administered by his Son Abdelkarim Khatib Said. He said his father purchased the house from the auction, and he was given the Certificate of Sale by Nkaya Company Limited who is the

Auctioneer. The Certificate of Sale dated 7th June 2016 was admitted as exhibit D6.

The Court considered the evidence presented in court by the witnesses, and also has considered the arguments of the learned counsels in their written submissions.

It should be noted that since the plaintiff has sued the defendants in her status as the wife of the 4th defendant, then the provisions of the Law of Marriage Act would apply. Under the Law of Marriage Act, a spouse in the marriage is free to acquire their own properties and they are free to deal with those assets in the manner they want. Section 60 (a) of the Law of Marriage Act, Cap 29 R: E 2019, reads:

“Where during the subsistence of a marriage, any property is acquired in the name of the husband or of the wife, there shall be rebuttable presumption that the property belongs absolutely to that person to the exclusion of his or her spouse.”

It is in evidence that the 4th defendant acquired the suit property prior to his marriages to the plaintiff or his first wife. The suit property was acquired by the 4th defendant through his own efforts before he married any of the wives. He even declared this in his affidavit which was admitted in court as exhibit D5. The 4th defendant also declared in his affidavit that none of his family member lives in the house, making it not a matrimonial asset. His affidavit was corroborated by the evidence of DW4, the Bank officer who said when doing the valuation of the suit property, the suit property was occupied by the tenants, and it was never occupied by the wives of the 4th defendant, or their children. In any case, the plaintiff failed to bring any tangible proof that at the time the house was mortgaged, she was occupying the house with her cowife, and the children.

Had it been a matrimonial home, and the husband had secretly mortgaged it to the Bank, the plaintiffs had a duty to protect their interest by filing a caveat in terms of section 78 of the Land Registration Act, Cap 334 R: E2019, as soon as they realized that their husband had mortgaged the house or even before. When the

Bank conducted a search at the Registrar of Lands, they found that the suit property was free from any encumbrances, thus, it corroborated the contents of his affidavit (Exhibit D5). In the case of **Idda Mwakalindile vs NBC Holding Corporation**, which quoted with approval the case of **Hadija Issa Arerary vs Tanzania Postal Bank, Civil Appeal No. 135** (unreported) at page 12, it was held:

“Under the law of Marriage Act, a spouse had a registrable interest in the matrimonial home. In this instance the appellant had not registered her interest. There was therefore no way the 1st respondent could have known of her interest considering that the house was in the sole name of her husband.”

It is true from the evidence in particular Exhibit D5, that the 4th defendant owns the property solely, and the property was registered in his names. He acquired the property even before he got married. The wives and children were not residing in the house and so the house was not a matrimonial property, and so no

consent of a spouse was needed. The contents of the affidavit (Exh D5) were not disputed and so the Bank, the 3rd defendant acted on it and approved the loan to the 2nd defendant. As held in the case of **Hadija Issa Areray** (supra), the mortgagee was correct to disburse the loan believing that there was not any third party with interest on the mortgage property hence the mortgage was valid.

The crucial issue discussed by the Court of Appeal in the above cited case is whether the mortgage of the suit property was proper in law. The Court of Appeal held that filing a caveat to protect interests of a matrimonial home is now not a requirement owing to the amendment made to section 114 of the Land Act which was effected through section 8(2) and (3) of the Mortgage Financing (Special Provisions) Act No.17 of 2008 (the **Mortgage Financing Act**). Section 8(2) and (3) of the Mortgage Financing Act has shouldered the responsibility of disclosing whether a mortgagor has a spouse to a mortgagor, with the mortgagee having to take 'reasonable steps' to verify such information.

The Court of Appeal further held that the Mortgagor is required to swear an affidavit with regards to his marital status and what was crucial was the content of the affidavit.

In the present case, the mortgagor disclosed in his affidavit that he has two wives, but also declared that the house in question is not the matrimonial house but his own personal house. The mortgagee made the efforts to verify this information and went to site to see if this was true. The mortgagee also carried out a search at the Registrar of Titles and found that the house was registered in the sole name of the 4th defendant thus tallying with his affidavit, that he owns the property in exclusion of any other person. The Bank officer verified before the Court that they only found tenants in the house when they went to value the house. Thus, making the contents of the affidavit of the 4th defendant (exhibit 5) undisputed. As held in the case cited above, Since the Mortgagor did not denounce the contents of his affidavit, the declaration made therein were true, that the house was

not a matrimonial asset and thus, there was no requirement of a spousal consent.

Thus, in the instance case, there was legal relationship of mortgagor and mortgagee between the 4th defendant and the bank by virtue of the mortgage deed. Therefore, the right to recover possession as conferred in the mortgage deed and under the Land Act was available to the Bank since the loan secured by the mortgage was not paid. By virtue of the affidavit sworn by the 4th defendant (exhibit D5), the plaintiff would not have acquired any interest in the suit property in terms of section 60 of the Law of Marriage Act, the husband is having the right to acquire and own property solely in exclusion of the spouses. If at all there was fraud, the fraud was practiced by the 4th defendant who is the husband of the plaintiff by misrepresenting to the bank that the house is not the matrimonial property while in fact it is the matrimonial property, and his two wives and children are residing there. It is the bank that was defrauded, and the doctrine of estoppel would have applied as against the 4th defendant as now he cannot turn around and allege that the property is the matrimonial property.

The plaintiff could not discharge her duty to establish that the house in question is not the property of the husband, and that it is a matrimonial property.

Now, to answer the first issue is that the mortgage was lawful as no consent of the wives was required for mortgaging it.

Since the first question was answered in the affirmative that the Bank held the suit property under a valid mortgage and were therefore entitled to initiate recovery of the loan by auctioning the mortgaged properties.

The plaintiff sues for redemption on the strength of an invalid mortgage deed, but her claims cannot succeed, because for obtaining a decree to redeem, it is necessary to prove the terms of the mortgage, and they cannot be proved by any other evidence than the document itself. In this case, as held hereinabove, the 3rd defendant had acquired mortgagee rights by a valid mortgage deed. The bank was also furnished by the affidavit of the 4th defendant stating that the house was not a matrimonial property. It was the duty of the plaintiff to prove otherwise that the wives and

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children were residing in the house, and that the house was a matrimonial house, and thus, her consent was needed. This was not forthcoming from the evidence of the plaintiff.

The house was already sold in a valid auction, and it was sold to the 5th defendant. The Certificate of Sale was already issued to the 5th defendant by an auctioneer. There was no evidence from PW1 or PW2 to show that there was not conducted a valid auction.

As a result, and from the above, the suit is dismissed with costs.

DATED AND DELIVERED AT DAR ES SALAAM THIS 17th DAY OF NOVEMBER 2021



(L MANSOOR)

JUDGE

17TH NOVEMBER 2021