

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 114 OF 2018**

**BETWEEN**

**ABDULRAZAK HUSSEIN ..... PLAINTIFF**

**VERSUS**

**DURA ABEID AWADH ..... 1<sup>ST</sup> DEFENDANT**

**ECOBANK TANZANIA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**DIAMOND TRUST BANK TANZANIA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**MCM OIL COMPANY ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

*Date of last Order: 31/10/2022*

*Date of Judgment: 29/11/2022*

**A. MSAFIRI, J.**

The plaintiff Abdulrazak Hussein lodged this suit against the defendants namely Dura Abeid Awadh (1<sup>st</sup> defendant,) ECO Bank Tanzania Limited (2<sup>nd</sup> defendant), Diamond Trust Bank Tanzania Limited (3<sup>rd</sup> defendant) and MCM Oil Company Limited (4<sup>th</sup> defendant).

The factual claims constituting the plaintiff case are pleaded in his plaint. Briefly, the plaintiff claims that, he was the lawful husband of the 1<sup>st</sup> defendant and among the properties which they acquire during the existence

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of their marriage is Plot No. 420 Block "A" with Title No. 32063 L.O 94689 located at Old Kinondoni Area in Kinondoni Municipality, Dar es Salaam (herein as suit property or suit premises). That, the marriage between the plaintiff and the 1<sup>st</sup> defendant did not work out and they were divorced after Kinondoni Primary Court announced the divorce in Matrimonial Cause No. 13 of 2013. That there was also an order of division of matrimonial property including the suit property.

That while the matrimonial cause was pending in Court, without the plaintiff's knowledge, notice or consent, in September 2012, the 1<sup>st</sup> defendant guaranteed the 4<sup>th</sup> defendant to acquire a loan amounting to Tshs. 200,000,000/= from the 2<sup>nd</sup> defendant, and pledged the suit property as a security.

That, the plaintiff also discovered that, without his knowledge, notice and consent, the 2<sup>nd</sup> defendant has transferred the security to the 3<sup>rd</sup> defendant to acquire a loan of Tshs. 800,000,000/= for the 4<sup>th</sup> defendant. The 3<sup>rd</sup> defendant went on to grant the said loan to the 4<sup>th</sup> defendant.

The plaintiff prays for judgment and decree against the defendants, jointly and severally as follows;

*Alls.*

- a) Declaratory order that mortgage created with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants over the suit property is void ab initio for failure to abide by the legal process and cannot be executed.
- b) An order for immediate release of the Certificate of Occupancy under Plot No. 420 Block A with Title No. 32063 L.O 94689, located at Old Kinondoni Area by the 3<sup>rd</sup> defendant to the plaintiff.
- c) Permanent injunction to restrain the defendants from interfering with the plaintiff's ownership of the suit property.
- d) Payment of mesne profit at the tune of Tshs. 400,000,000/= by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants for unlawful possession and use of the Certificate of Occupancy of the suit property.
- e) Payment of general damages of Tshs. 100,000,000/= by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as per the Court assessment.
- f) Costs of the suit; and
- g) Any other relief as this Court may deem fit and just to grant.

The 1<sup>st</sup> defendant filed her written statement of defence on which she neither denied nor admitted any claims in the plaint. She just noted the contents of the plaint and added that she agreed to process the mortgage

*Atls.*

and act as the guarantor after the 4<sup>th</sup> defendant promised to give her some amount of Tshs. 40,000,000/= which she did not receive up to date.

She also averred that the transfer of security from 2<sup>nd</sup> defendant to 3<sup>rd</sup> defendant was done without her consent and that the 2<sup>nd</sup> and 4<sup>th</sup> defendants failed to inform her about filing the spouse consent to allow her to process the mortgage. She prayed that the plaintiff's prayers be granted without costs.

The 2<sup>nd</sup> defendant also filed her written statement of defence. She denied the plaintiff's claims and stated that, at the time the 1<sup>st</sup> defendant offered the suit property to the 2<sup>nd</sup> defendant for the 3<sup>rd</sup> party mortgage to secure the loan advanced to the 4<sup>th</sup> defendant, the said 1<sup>st</sup> defendant affirmed an affidavit that the suit property was not a matrimonial asset as she was not married.

The 2<sup>nd</sup> defendant stated further that the Title Deed of the suit property was in the name of the 1<sup>st</sup> defendant and there was no and until to date there is no any caveat to that end. She stated that all transactions over the said Title Deed were consented by the registered owner (1<sup>st</sup> defendant) and similarly the transfer of the loan to the 3<sup>rd</sup> defendant was consented and

*Alle.*

secured by mortgage of the Title Deed. The 2<sup>nd</sup> defendant prayed for the dismissal of the plaintiff's suit with costs.

The 2<sup>nd</sup> defendant also filed a counterclaim. In the counterclaim, the 2<sup>nd</sup> plaintiff reiterated the averments in her written statement of defence. She maintained that, the plaintiff and the 1<sup>st</sup> defendant concealed to this Court in Matrimonial Cause No. 13 of 2013 the fact that, prior to the judgment in that case dated 07/5/2015, the 1<sup>st</sup> defendant had mortgaged the suit property to the 2<sup>nd</sup> defendant and consented to the transfer of the mortgage from the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant. Further, the 2<sup>nd</sup> defendant claimed that, the plaintiff's case is a fraudulent scheme by and between the plaintiff and the 1<sup>st</sup> defendant to defraud the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

In the counterclaim, the 2<sup>nd</sup> defendant prayed for judgment and decree on counter claim as follows; first, for payment of punitive damages as the Honourable Court shall assess and grant, and second; for the interest on the decretal sum at the Honourable Court's rate of 7% per annum from the date of judgment until full and final payment, third; costs of the counterclaim and fourth; any other relief (s) the Court may deem fit and just to grant. *Alle-*

The 3<sup>rd</sup> defendant also filed her written statement of defence in which she vehemently refuted the plaintiff's claims. She stated that at the time when the 1<sup>st</sup> defendant offered the suit property for the third party mortgage for the loan advanced to the 4<sup>th</sup> defendant, the plaintiff was not living under one roof with the 1<sup>st</sup> defendant as the plaintiff was already married to another wife.

That, the suit property was solely registered under the name of the 1<sup>st</sup> defendant and there was and still there is no any caveat registered to that end. The 3<sup>rd</sup> defendant added that all transactions over the suit property was consented by the registered owner, the 1<sup>st</sup> defendant. She prayed for the dismissal of the suit with costs.

The 4<sup>th</sup> defendant in his written statement of defence, denied all claims by the plaintiff. He averred that there was no any faults in creating the mortgage over the suit property, and that the 4<sup>th</sup> defendant fulfilled all the process and requirements that were needed by the defendants Banks as per their procedures, processes, rules, policies and guidelines in creating the respective mortgage. He prayed for the dismissal of suit with costs.

**At the final pretrial conference, the following issues were framed;**

*Alls*

1. Whether the mortgaged property is the matrimonial property;
2. Whether the plaintiff had knowledge or consented to the mortgage of the suit property (mortgaged property).
3. Whether the mortgaging of the suit property was lawful.
4. Whether there is a conspiracy between the plaintiff and the 1<sup>st</sup> defendant to defraud the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
5. What relief (s) are the parties entitled to?

At the trial, Mr. Kelvin Mshana, learned advocate appeared for the plaintiff, Mr. Gabriel Mnyele, learned advocate appeared for the 1<sup>st</sup> defendant, Mr. Mpayya Kamara, learned advocate appeared for the 2<sup>nd</sup> defendant, Mr. Stanslaus Ishengoma, at first appeared for the 3<sup>rd</sup> defendant but later his place was taken by Mr. Zakaria Daudi, learned advocate. Mr. Micah Mrindoko, the proprietor of the 4<sup>th</sup> defendant appeared in person, unrepresented.

Starting with the first issue as to whether the mortgaged property (also suit property) is the matrimonial property, it is the claim of the plaintiff that it is.

*Alle.*

In his testimony as PW1, the plaintiff stated that the 1<sup>st</sup> defendant was his wife and they were married in 1984. He produced a copy of marriage certificate which was admitted as Exhibit P1. He said that they were divorced on 15/01/2014 and the divorce was announced by Kinondoni Primary Court.

While the marriage was existing, on advice of one Abdulhamid Abeid Awadh, a plaintiff's brother in law; the plaintiff and 1<sup>st</sup> defendant bought a plot in Dar es Salaam and erected a house there on. That in construction of the house, the plaintiff and the 1<sup>st</sup> defendant entered into partnership with the said Abdulhamid Abeid Awadh. That, the plaintiff and 1<sup>st</sup> defendant owned 50% of the property while Abdulhamid Abeid Awadh owned 50% of the property. The plaintiff tendered a copy of a certificate of occupancy on the suit premises which was admitted as exhibit P2.

He stated further that, the suit property was pronounced to be a matrimonial property by the decision of Kinondoni Primary Court. The said Court judgment was tendered as exhibit P3, he also tendered a High Court Judgment on the same subject matter, which was admitted as Exhibit P4.

*Alle.*



PW1 said that, he lives in Mwanza at most of time and he was unaware that the 1<sup>st</sup> defendant has guaranteed the 4<sup>th</sup> defendant to take a loan and mortgaged their matrimonial property as security.

That he confronted the 1<sup>st</sup> defendant who agreed to have taken a loan from Ecobank (2<sup>nd</sup> defendant), but ensured him that the loan has already been settled. That, the 1<sup>st</sup> defendant told him that she did not take a loan from Diamond Trust Bank (DTB) (3<sup>rd</sup> defendant).

The plaintiff contended that he has never taken a loan from the Banks (2<sup>nd</sup> and 3<sup>rd</sup> defendants), he never consented to the mortgage and the suit premises is a matrimonial property and was illegally mortgaged.

On cross examination by the counsel for the 1<sup>st</sup> defendant, he said that the money used to build a suit premises came from the business of shop and transport which was jointly owned by him and his then wife, the 1<sup>st</sup> defendant but later, after financial constraint, Abdulhamid Abeid Awadh (PW2) contributed to complete the suit premises and they became partners.

On cross examination by the counsel for the 2<sup>nd</sup> defendant, the plaintiff stated that the divorce case between him and the 1<sup>st</sup> defendant was instituted in 2013 while the mortgage was entered by Dura Abeid, the 1<sup>st</sup>

*Alle-*

defendant in 2012. He admitted that between the mortgage and the divorce, the mortgage came first. He said that, during the matrimonial proceedings, they did not reveal to the Court that the suit property was mortgaged. But he maintained that, that was because at that time, he didn't know that the property was mortgaged.

In further cross examination, PW1 was shown a Certificate of Occupancy Exhibit P2. He admitted that the same shows the owner as Dura Abeid, the 1<sup>st</sup> defendant. That the plaintiff's name and one of Abdulhamid Abeid Awadh (PW2) does not feature in the said Exhibit P2.

He stated further that, they (plaintiff, the 1<sup>st</sup> defendant and Abdulhamid Abeid Awadh), the purported partners of the suit property never registered a Caveat on the suit property. That even at the time the 1<sup>st</sup> defendant made a mortgage, the property had no caveat, so the Bank search could have found no caveat at all. He admitted that there is no written document to prove the partnership between him, 1<sup>st</sup> defendant and Abdulhamid Abeid Awadh.

PW2 was Abdulhamid Abeid Awadh. His evidence mainly corroborates the evidence of PW1 particularly the part that him (PW2), the plaintiff and

*Alls*

the defendant are the co-owners of the house at Ufipa Street (suit property). He said that the idea of building of the house was the idea of the plaintiff and the 1<sup>st</sup> defendant. He stated further that at some time, the plaintiff and the 1<sup>st</sup> defendant were facing financial difficulties, so the three of them agreed that, PW2 will contribute to the construction of the suit premises and become the co-owner of the same.

PW2 told the Court that, there was matrimonial case at Kinondoni Primary Court in which he was a witness. That the Court decided that the ownership of the house should be between the 1<sup>st</sup> defendant, PW2 and the plaintiff.

In cross examination he stated that he never seen the judgment of the said matrimonial case but was told by the 1<sup>st</sup> defendant about the distribution of the matrimonial property. He admitted that the partnership between him, the plaintiff and the 1<sup>st</sup> defendant was never written. He stated further that, he has been in partnership since 1991 but have never registered a caveat on the suit property at the Registrar of Titles.

In cross examination, PW2 admitted further that, as per the Certificate of Occupancy exhibit P2, the owner of the suit property is the 1<sup>st</sup> defendant,

*Alles*

That, there was no way a Bank taking/creating a mortgage could have known that PW2 and PW1, the plaintiff have interest in the property.

The 1<sup>st</sup> defendant, testified as DW1. She stated that she was married to the plaintiff in 1984 and among the properties achieved during the marriage was the suit property. She identified a copy of certificate of occupancy admitted in Court as exhibit P2. She said that, she agreed with the plaintiff that the suit property is to be registered in her name although the property is a family property.

DW1 said that after facing financial challenges, her brother Abdulhamid Abeid Awadh (PW2) assisted them financially in the suit premises construction. After that, the three of them agreed to become partners in ownership of the suit property whereby the 50% was owned by Abdul Abeid, and another 50% was owned jointly by her (DW1) and her husband (plaintiff). DW2 admitted to have guaranteed the 4<sup>th</sup> defendant to get a loan and in the process she mortgaged the suit property.

She said that, she, the 4<sup>th</sup> defendant (represented by Mica Mrindoko) and one Suta went at Ecobank to process for the loan. At Ecobank, DW 1 was asked to present the certificate of occupancy on the suit property. So, *Alls.*

next time she went to Ecobank (2<sup>nd</sup> defendant) she took the said Certificate of Occupancy. She said that she agreed that the 4<sup>th</sup> defendant be granted a loan, but not all Tshs. 270 million.

She added that at the Bank she was not asked about her marital status.

DW1 stated more that, the Bank prepared a mortgage and guarantee documents and other documents and she signed them with her thumb print.

She stated further that, she was never given Tshs. 45 Million which the 4<sup>th</sup> defendant promised her as consideration for guaranteeing him for the loan. She said that she has instituted a case against the 4<sup>th</sup> defendant, a Case No. 2 of 2015 at Kinondoni Magistrate Court.

DW1, testified that her education level is standard seven and she don't understand English. The witness DW1 was shown a document which is her affidavit/declaration of her marital status that she was single. **She replied that she recognized her signature on the document but does not understand** what is written therein. She said she never made the document. That, during the mortgaging process, the 4<sup>th</sup> defendant came at her house during the night and practically forced her to sign many documents which she did not understand. *Atle.*

DW1 stated that she has never signed anything before the advocate named Silas Nziku. She admitted that she guaranteed the 4<sup>th</sup> defendant to get a loan at Ecobank with the Title of the suit property but has never guaranteed anybody at DTB (3<sup>rd</sup> defendant).

She stated that, she hide from the plaintiff and PW2 the fact that she has guaranteed the 4<sup>th</sup> defendant to get a loan and mortgaged the suit property. In cross examination, DW1 stated that in a matrimonial cause, she did not reveal to the Court that one of the houses' Title was at Bank as security for mortgage.

DW2 was Hope Liana, a Bank Officer employed by the 2<sup>nd</sup> defendant as the Head of Legal Unit and Company Secretary.

She said that she know the 1<sup>st</sup> defendant as a guarantor who guaranteed the 4<sup>th</sup> defendant to get a loan by the 2<sup>nd</sup> defendant and who mortgaged her house, the suit property for security. She told the Court about the procedure which is followed by the Bank in processing the mortgage. She stated that before accepting the Title Deed of a landed property for mortgage, the Bank conducts a search at Land Registry to ascertain whether the details and particulars of a Title Deed produced for security matches with

*Alles*

the particulars at the Land Registry. Another purpose of search is to know whether there is any encumbrances over the landed property.

After that, the Bank prepares mortgage documents. The Bank has to get information from the mortgagor about his/her marital status for the purpose of issuing either spousal consent or an affidavit of marital status. DW2 told the Court that all the stated steps were done by the Bank (2<sup>nd</sup> defendant).

She said that the Title Deed (exhibit P1) shows that the property was owned by the 1<sup>st</sup> defendant. Their search at the Land Registry and the documents produced to them by the 1<sup>st</sup> defendant shows that the suit property was not matrimonial property.

About the spouse consent, DW2 stated that the 1<sup>st</sup> defendant declared through an affidavit that she was not married. She tendered the affidavit of the 1<sup>st</sup> defendant which was admitted as Exhibit D1. She said that the affidavit was brought at the Bank (2<sup>nd</sup> defendant) by the 1<sup>st</sup> defendant who is the deponent.

*Aille.*

DW3 was one Silas Adam Nziku, an advocate. He identified Exhibit D1 as an affidavit sworn by the 1<sup>st</sup> defendant. He stated that he was the advocate who attested the said affidavit.

He identified in Court the 1<sup>st</sup> defendant and the 4<sup>th</sup> defendant. DW3 stated that he was the one who administered the affirming of the affidavit by Dura Abeid the 1<sup>st</sup> defendant. That the 1<sup>st</sup> defendant came with the 4<sup>th</sup> defendant at his office (DW3's) and the latter was the one who introduced the former.

DW3 stated that he knew the 4<sup>th</sup> defendant previously. He said that he was not the one who drafted the affidavit but the 1<sup>st</sup> defendant came with it and he just attested. That, he asked the 1<sup>st</sup> defendant on whether she knew the contents of the affidavit. That the 1<sup>st</sup> defendant replied that, because she is not married, she was told by the Bank to affirm an affidavit on that. She told him that the Bank needs the affidavit because she wanted to guarantee someone for a loan.

Having analysed the evidence of the parties to the suit specifically on addressing the first issue, it is my observation based on the evidence that

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the plaintiff failed to establish that the mortgaged property was a matrimonial property.

My reasons for that observation are derived from the interpretation of the term "matrimonial property".

The Court of Appeal in the case of **National Bank of Commerce Limited vs. Murbano Abdallah Mulla**, Civil Appeal No. 283 of 2017, CAT at Tanga (unreported) while making distinction between matrimonial home and matrimonial property, were of the view that;

*"On the other hand, the phrase matrimonial property has similar meaning to what is referred as matrimonial asset and it includes **a matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during marriage.**"(Emphasis added).*

In the present suit, the suit property is registered by the sole name of Dura Abeid Awadh, the 1<sup>st</sup> defendant.

I am aware of the principle set by the Court of Appeal which was reiterated in the case of **National Bank of Commerce Ltd vs. Murbano Abdallah Mulla (supra)**, that even if the mortgaged property is under the

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name of one spouse alone, he/she cannot deprive the other spouse his right over the mortgaged property. However, as per the evidence adduced by the plaintiff himself, as PW1, and PW2 and the 1<sup>st</sup> defendant, the suit property cannot be termed as a matrimonial property. Plaintiff as PW1 stated that, at first, the suit property was built under joint efforts of him and his then wife 1<sup>st</sup> defendant. However, at the next stage, PW2 was the one who contributed largely on the construction of the suit property. That the plaintiff and 1<sup>st</sup> defendant entered into unwritten partnership with PW2 on the ownership of the suit property. He said further that he, plaintiff and 1<sup>st</sup> defendant jointly owned 50% of the ownership of the house and the other 50% of the ownership was by PW2.

The plaintiff told this Court that the house has three partners who own the house. PW2 confirmed that he was the co-owner of the suit property. He stated that he contributed to the construction of the house. At page 34 of the typed proceedings, PW2 stated that.

*"After the completion of the house, we saw that we have contributed equally in the building expenses."*

*Alle.*

PW2 stated further that they were three partners so even in the receipt of the rent, they were receiving and distributing equally among the three.

The 1<sup>st</sup> defendant also admitted that PW2 was the one who took over the construction of the property by his own money until it was completed. She said further that PW2 was living in the said house and they agreed that he will be collecting rent from the tenants until he collect his debt, and after that they became partners, sharing the rent between the three of them.

By this evidence, the suit property does not fall within the definition of the term matrimonial property as set by the Court of Appeal in the case of **National Bank of Commerce Ltd (supra)**.

As per evidence, the suit property is shared between the three persons, two who were wife and husband and another person.

In my opinion, a matrimonial property cannot be shared by any other partner/person beside the spouses. If there is a third person who claims to have contributed equally in acquiring the property, then that property is not a matrimonial property. It cannot simultaneously be a matrimonial property and a property jointly owned by three partners who have contributed equally.

Atts.

in acquiring the said property. A matrimonial property should be a property acquired by either spouse or both spouses before or during marriage.

Furthermore, I find that the suit property also has no qualifications to be categorized matrimonial home.

According to the evidence, it was obvious that at the time the 1<sup>st</sup> defendant was mortgaging the suit property, she and the plaintiff were not residing in the suit property. The plaintiff said that he lives in Mwanza and Dar es Salaam but he is in Mwanza most of the time. He said that he has a room at the suit property.

The 1<sup>st</sup> defendant evidence shows that, the house was not a matrimonial home. She stated in her evidence in chief that PW2 was living in that house. It is not clear when PW2 moved out of the house and the plaintiff and his family moved in and started living as a family. However, the 1<sup>st</sup> defendant told the Court that;

*"Before divorce, I was angry and left the house. I remember I left the house in 2012 and went to live in another house but we were not yet divorced. I went to live at Magomeni."*

*Alle.*

Magomeni house is where the 1<sup>st</sup> defendant was living when the 4<sup>th</sup> defendant took to her various documents allegedly during the night and asked her to sign them.

Section 2 of the Law of Marriage Act, Cap 29 R.E 2019, which is in *pari materia* with section 112 (2) of the Land Act, Cap 113 R.E 2019, provides that;

*"Matrimonial home means the building or part of a building in which the husband and wife ordinarily resides together..."*

I have gone through the evidence of the plaintiff (PW1), PW2 and 1<sup>st</sup> defendant (DW1), I have not found any evidence which shows clearly that there was a time particularly during the creation of a mortgage, when the plaintiff and 1<sup>st</sup> defendant were residing together in a suit property.

What I see is what I have analysed herein above, the plaintiff living in Mwanza and Dar es Salaam, mostly in Mwanza, PW2 residing in the suit property as a co-partner, collecting rent. Then there is story of 1<sup>st</sup> defendant moving out of the suit house in 2012 and going to live in another house. This cement my findings that the suit property does not fall even in the category of a matrimonial home.

*Alle.*

I feel that I should have a look on the issue of the existence of the judgment of the Matrimonial Cause No. 13 of 2013 by Kinondoni Primary Court which was admitted as exhibit P3. The plaintiff stated that there was matrimonial cause which the 1<sup>st</sup> defendant has filed for divorce. That Kinondoni Primary Court declared the suit property a matrimonial property.

However, in cross examination, the plaintiff admitted that the matrimonial cause was filed in 2013 after the suit property was mortgaged. The mortgage was created in 2012. This was also admitted by the 1<sup>st</sup> defendant who said that she hide this information from the court. So, the suit property was not matrimonial property and also at the time of the judgment of Kinondoni Primary Court in a matrimonial cause, the suit property was already mortgaged.

Nevertheless, having gone through the said judgment, it is not ascertained that the house located at Ufipa Street No. 166 which is stated in the said Judgment is the same suit property described in the plaint as Plot No. 420 Block A, Old Kinondoni Area in Kinondoni Municipality. The plaintiff failed to establish whether the two properties are one and the same.

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Furthermore, the 1<sup>st</sup> defendant cemented that the suit property is not matrimonial property when she affirmed an affidavit that she is registered owner of suit property, she is not married and hence the suit property is not matrimonial one. As stated earlier, the affidavit was received in Court as exhibit D1.

Basing on that evidence, I am satisfied that the suit property was neither matrimonial property nor matrimonial home. Hence, the first issue is answered in negative.

The second issue is whether the plaintiff had knowledge or consented to the mortgage of the suit property. Having found that the suit property is not the matrimonial property, it is my view that whether the plaintiff had knowledge or consented to the mortgage of suit property is immaterial.

Since the suit property was not matrimonial property but rather owned jointly by three partners, there is no legal requirement that one co-owner of the real property must consent or issue a consent before the mortgaging of the said property by another partner. A consent is a mandatory requirement under the Law of Marriage Act and Land Act when the property which is intended to be mortgaged is a matrimonial property or matrimonial home.

*Alle*

The suit property was not. It was owned in partnership between the three people and they chose the 1<sup>st</sup> defendant's name to be the one shown on the Certificate of Title as the owner. It might have been the obligation of the 1<sup>st</sup> defendant to inform her fellow partners about her intention to mortgage their property but that is a different matter which is not before this Court.

The second issue is answered that since the suit property was not matrimonial then the knowledge or consent of the plaintiff was not mandatorily required in the mortgage of the suit property.

The third issue is whether the mortgaging of the suit property was lawful.

In his evidence, the plaintiff seems not to dispute the mortgage created first by the 2<sup>nd</sup> defendant, but he is disputing the mortgage created by the 3<sup>rd</sup> defendant and prays to the Court to declare it void ab initio. It is stated in his plaint that the 2<sup>nd</sup> defendant without knowledge, notice and consent of the plaintiff, transferred the security to the 3<sup>rd</sup> defendant to acquire loan in favour of the 4<sup>th</sup> defendant.

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When cross examined by the advocate for the 3<sup>rd</sup> defendant, the plaintiff claimed that the loan by ECO Bank (2<sup>nd</sup> defendant) was legal but the one from DTB was entered by fraud between MCM (the 4<sup>th</sup> defendant) and DTB whereby they cheated on the 1<sup>st</sup> defendant.

The claims of fraud and cheat between the 3<sup>rd</sup> defendant and 4<sup>th</sup> defendant were not pleaded in the plaint. The plaintiff raised them in the course of cross examination hence they cannot be regarded by this Court. Besides, the plaintiff failed to prove his claims of fraud by the 3<sup>rd</sup> and 4<sup>th</sup> defendants and how they cheated the 1<sup>st</sup> defendant. Hence, I dismiss the said claims.

I will look at both mortgages, the one purported to be created by the 2<sup>nd</sup> defendant and the other one purported to have been created by the 3<sup>rd</sup> defendant; both over the suit property.

According to the plaintiff and the 1<sup>st</sup> defendant, the first mortgage was legal and they have no dispute over it.

When cross examined by the counsel for the 3<sup>rd</sup> defendant, he said that the loan by ECO Bank was legal. In her evidence the 1<sup>st</sup> defendant

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admitted to have guaranteed the 4<sup>th</sup> defendant for a loan at ECO Bank but she denied to have guaranteed the same at DTB Bank.

In my view, if the mortgage of the suit property by the 2<sup>nd</sup> defendant was legal then the mortgaging of the suit property by the 3<sup>rd</sup> defendant was also legal. The reason for my position is that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants complied with the legal procedures required in the creation of the mortgage for credit facility. The 1<sup>st</sup> defendant was a guarantor of the 4<sup>th</sup> defendant. Using as a collateral the Title Deed of the suit property, she guaranteed a described loan which was advanced by the 2<sup>nd</sup> defendant to 4<sup>th</sup> defendant on 17/9/2012. After few days, in October 2012, another loan was issued to the 4<sup>th</sup> defendant by DTB Bank. The 1<sup>st</sup> defendant was a guarantor and she mortgaged the same suit property. At that time, a loan of the 4<sup>th</sup> defendant and all liabilities by the 2<sup>nd</sup> defendant was transferred from the said 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant.

The legal procedures which were followed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in processing mortgage were stated by DW2 Hope Liana for the 2<sup>nd</sup> defendant and DW4 Betty Jonas Rupia for the 3<sup>rd</sup> defendant. DW2 stated that, in processing mortgage, before accepting the Title Deed for security purposes, the Bank conducts valuation of the property, also conduct a search

*Atts.*

at the Land Registry to see whether the particulars in the Title Deed matches with the one at the Land Registry and whether the property has any encumbrances. The Bank then conduct site visit to see the property to be mortgaged. After that, the Bank prepares mortgage documents and among them the mortgagor's consent from his/her spouse or if he/she is single, a declaration of marital status or an affidavit.

DW2 said that the 2<sup>nd</sup> defendant did all these procedures. The suit property had no any encumbrances and there was no any registered caveat at the Land Registry concerning the suit property. Furthermore, the mortgagor, the 1<sup>st</sup> defendant, affirmed an affidavit, declaring her marital status as single.

DW2 stated that the Bank was satisfied that the suit property was free from encumbrances, that the 1<sup>st</sup> defendant is the sole owner of the property and it was not a matrimonial property. Having done due diligence, the Bank went on to create mortgage and it was lawful. The affidavit of the 1<sup>st</sup> defendant on her marital status was admitted as Exhibit D1. DW2 stated that having registered the mortgage, the loan was disbursed to MCM Oil Company (4<sup>th</sup> defendant) and later after sometime, the loan was taken over by the DTB Bank, the 2<sup>nd</sup> defendant.



DW2 stated that the process of taking over of the loan from ECO Bank to DTB Bank involved 1<sup>st</sup> defendant, 2<sup>nd</sup> defendant, 3<sup>rd</sup> defendant and the 4<sup>th</sup> defendant.

DW2 stated further that their client the 4<sup>th</sup> defendant, asked them (2<sup>nd</sup> defendant) to transfer his loan to the 3<sup>rd</sup> defendant. The 4<sup>th</sup> defendant has not completed the payment of his loan at the 2<sup>nd</sup> defendant Bank, hence the loan and the securities (including the mortgaged property) were moved to the 3<sup>rd</sup> defendant Bank.

That the 1<sup>st</sup> defendant acknowledged the transfer on the offer letter dated 05/12/2012. It was an offer letter from 3<sup>rd</sup> defendant to 4<sup>th</sup> defendant. The 1<sup>st</sup> defendant signed the said letter of offer in acknowledgement in 06/12/2022.

DW4 was a witness for the 3<sup>rd</sup> defendant. She confirmed that, the 2<sup>nd</sup> defendant extended a loan to the 4<sup>th</sup> defendant, and the guarantor was the 1<sup>st</sup> defendant who mortgaged the suit property. She tendered a photocopy of the letter of offer of 05/12/2022 which shows that 3<sup>rd</sup> defendant offered a loan of Tshs. 800,000.000/= to the 4<sup>th</sup> defendant. The letter was admitted

*Alle.*

as exhibit D2. The witness also produced a Mortgage of Right of Occupancy between the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant as Exhibit D3.

DW4 stated that all procedures were complied with the 3<sup>rd</sup> defendant Bank.

That, the mortgage was registered in 12/12/2012. The necessary documents which are needed for registration were made and some were produced by the guarantor. The documents were a letter of offer, Valuation Report of the property, and a valid passport size of the mortgagor. That the mortgagor (1<sup>st</sup> defendant) produced an affirmed affidavit that she was not married. She produced a photocopy of the purported affidavit of the 1<sup>st</sup> defendant as exhibit D4. In the affidavit, the 1<sup>st</sup> defendant declared that she was not married and she was the sole owner of the suit property.

DW4 insisted that the 1<sup>st</sup> defendant signed a letter of offer so she consented for DTB Bank to buy the loan and transfer mortgage.

As per the evidence adduced particularly by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the mortgage was lawful.

On the first loan by the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant, guarantor to the borrower, affirmed an affidavit and declared that, the suit property was not a matrimonial asset within the meaning of Land Act and the Law of

*Alle*

Marriage Act, and that she was not married. The attorney Adam Silas Nziku DW3 was the one who attested the affidavit.

The 2<sup>nd</sup> defendant made a search at the Land Registry and was satisfied that the suit property had no encumbrances and no caveat was registered. This fact was admitted by the plaintiff and PW2, the purported co owners of the suit property that there was no a registered caveat on the suit property.

On the 3<sup>rd</sup> defendant loan which was transferred from the 2<sup>nd</sup> defendant, transfer of a loan is not unlawful. It is practiced by the Banks and financial institutions. This was even admitted by the plaintiff in his evidence that the loan transfer is not illegal.

I am satisfied that the said transfer of loan facility and mortgage from 2<sup>nd</sup> defendant to 3<sup>rd</sup> defendant was lawful.

It was proved that the 1<sup>st</sup> defendant, the mortgagor was aware of the transfer and consented. This is shown by Exhibit D2 which is an offer of over draft facility of TZS 800,000,000/= from DTB to the 4<sup>th</sup> defendant. It was accepted by 4<sup>th</sup> defendant and the 1<sup>st</sup> defendant accepted as a guarantor. She signed the acceptance on 06/12/2012.

*Alle*

There is also exhibit D3 which is also an agreement between the DTB Bank on one side and the 1<sup>st</sup> and 4<sup>th</sup> defendants on the other side on mortgage of a Right of Occupancy.

The 3<sup>rd</sup> defendant through the evidence of DW4 stated that the 1<sup>st</sup> defendant made a statutory declaration that she was not married. This declaration was admitted as Exhibit D4. It was vehemently objected by the plaintiff, 1<sup>st</sup> defendant and 4<sup>th</sup> defendant. The parties raised doubts on the authenticity of the document and the Court admitted the same and held that the issue of the authenticity of a document will be determined during the composition of a judgment.

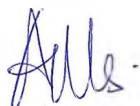
The raised doubts were on the signature where it was argued that the signature did not belong to the 1<sup>st</sup> defendant and that the Commissioner for Oath who attested the affidavit was not called/summoned as a witness to come and prove to the Court that he/she was a maker of the document. That the witness who tendered the affidavit failed to prove that the signature and writing on the document was of the maker of the document. Also that the document was a secondary evidence and the 3<sup>rd</sup> defendant did not show good cause for tendering a secondary evidence.

*Alle*

On the Exhibit D4 being a secondary evidence, the Court has been satisfied by the reason given by the 3<sup>rd</sup> defendant that the original one was misplaced when it was used in another case which involves same subject matter. On the authenticity of Exhibit D4, the plaintiff, 1<sup>st</sup> and 4<sup>th</sup> defendant argued that they have doubts on the same and stated that the signature of the maker of the document must be proved to be his as provided under section 69 of the Evidence Act, Cap 6. R. E. 2019.

It is my finding that the document exhibit D4 is authentic. My reason for the finding is that I have compared the signature of the deponent in Exhibit D1 which is an affidavit of the 1<sup>st</sup> defendant, with Exhibit D4 and I have been satisfied that the same was made by the same person i.e. the 1<sup>st</sup> defendant. I have done so as provided under section 75 of the Evidence Act.

The 1<sup>st</sup> defendant did not contest that she signed the document from ECO Bank which included Exhibit D1. What she stated is that she signed the documents without understanding the language as they were in English language. Hence all the documents by ECO Bank were signed by the 1<sup>st</sup> defendant Dura Abeid.





Section 75 of the Evidence Act, allows the comparison of the contested document i.e. comparison of signature, writing or seal with other documents admitted or proved. Hence in determination whether Exhibit D4 was authentic, I have compared the signature appearing on Exhibit D1, a signature of deponent Dura Abeid (1<sup>st</sup> defendant) with that of Exhibit D4, the one which is contested and find that the signatures are the same and have been signed by the same person.

Having found that, all legal procedures were complied with by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the creation of mortgage in respect of the suit property. Besides, since the suit property was not a matrimonial property, no consent or declaration was necessary.

The suit property was not a matrimonial property, the Title Deed on the suit property was in a sole name of the 1<sup>st</sup> defendant, there was no any encumbrances, no any registered caveat on the suit property and the mortgagor made a statutory declaration that she was a single woman and the suit property was under her sole ownership.

I am satisfied that the Banks has conducted due diligence before processing the mortgage.



In the circumstances where there was no registered caveat on the suit property and it was free from encumbrances as per exhibit D5 and the mortgagor has declared that she was not married, the Bankers had no way of knowing that the suit property was matrimonial and that the 1<sup>st</sup> defendant has disclosed important information about her marital status.

The third issue is answered in affirmative.

The fourth issue is whether there was conspiracy between the plaintiff and 1<sup>st</sup> defendant to defraud the 2<sup>nd</sup> and 3<sup>rd</sup> defendants?

In determining this issue, I have gone through the whole evidence by parties to this suit. In my opinion, if there is ever a conspiracy to defraud the Banks (2<sup>nd</sup> and 3<sup>rd</sup> defendants) then it was between the 1<sup>st</sup> and 4<sup>th</sup> defendants.

If there is any conspiracy between the plaintiff and the 1<sup>st</sup> defendant then it was not proved to a balance of probability. The evidence of the plaintiff shows that he was unaware that the 1<sup>st</sup> defendant his former wife has mortgaged the suit property. He said that he lived in Mwanza with his other wife and he came to realize in 2017 that the suit property was mortgaged.

*Alb*

The plaintiff claimed that during the matrimonial proceedings for divorce and distribution of properties, he was unaware that already his wife has mortgaged the suit property. 1<sup>st</sup> defendant also stated that she hide the fact that she mortgaged the property to her former husband the plaintiff and even her brother PW2.

While giving evidence, when he was examined, the 4<sup>th</sup> defendant admitted that he knew that the 1<sup>st</sup> defendant was married. He said further that, he knew that the 1<sup>st</sup> defendant was married, however he did not say anything when the mortgage was being perfected because the mortgage agreement was between the 1<sup>st</sup> defendant and the Bank. Hence, the 1<sup>st</sup> defendant and the 4<sup>th</sup> defendant, chose to hide this important information from the Banks in order to achieve their goals of getting a loan.

By this, I find that there is no clear evidence that there was a conspiracy between the plaintiff and 1<sup>st</sup> defendant to defraud the Bank. However, I am associating myself with the decision of this Court by my learned brother Hon. Luvanda, J in the case of **Diamond Trust Bank (T) Ltd vs. Dura Abeid Awadh and Micah Elifurah Mrindoko t/a MCM Oil Company**, Land Case No. 62B (92) of 2013, High Court Dar es Salaam (unreported), that the

*Alle.*

conducts of the current 1<sup>st</sup> defendant and 4<sup>th</sup> defendants are suspicious and their story was concocted as they had interest to serve each other.

The fourth issue is answered in negative.

The fifth issue is what reliefs are parties entitled to.

The claim of the plaintiff in this suit is against the defendants jointly and severally for a declaratory order that the mortgage created by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is void ab initio for failure to abide by the legal process. He claims for other reliefs as shown earlier here in above.

Having analysed the evidence adduced, the Court finds that the mortgages were lawful created and the suit property was not a matrimonial property in terms of section 2 and section 114(3) of the Law of Marriage Act and Section 112 of the of the Land Act.

Basing on the hereinabove findings, the plaintiff is not entitled to any of the reliefs claimed and all the claims are hereby dismissed with costs.


On the 1<sup>st</sup> defendant's part, she prayed for the plaintiff's prayers to be granted without costs. However, the Court has dismissed the plaintiff's prayers with costs as the plaintiff have failed to establish his case on balance of probabilities.

Alle

The 2<sup>nd</sup> defendant has prayed for the plaintiff's case to be dismissed with costs. The 2<sup>nd</sup> defendant also has raised a counterclaim against the plaintiff that the case at hand is a fraudulent scheme by and between the plaintiff and the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant prayed for the punitive damages and for the interest on the decretal sum of 7% per annum until full and final payment and costs of counter claim.

I have assessed the evidence which was adduced by the witness of the 2<sup>nd</sup> defendant. As I have already found in the fourth issue, the 2<sup>nd</sup> defendant has failed to establish her claims of fraudulent scheme between the plaintiff and the 1<sup>st</sup> defendant.

About the plaintiff's concealment of facts in Matrimonial Cause No. 13 of 2013 that the suit property was mortgaged, that was not established in the evidence. Indeed, there was concealment of the fact that the suit property was mortgaged, however the evidence points to the 1<sup>st</sup> defendant only. The plaintiff stated that he was unaware that the 1<sup>st</sup> defendant has already mortgaged the suit property.

About the concealment to the 2<sup>nd</sup> defendant of the fact that the plaintiff and 1<sup>st</sup> defendant were spouses, this too was not established. It was the 1<sup>st</sup> 

defendant and 4<sup>th</sup> defendant who came to the 2<sup>nd</sup> defendant and negotiated the request for credit facility which was guaranteed by the 1<sup>st</sup> defendant. It was not proved that the plaintiff was ever part of the mortgage process.

So, I find that the 2<sup>nd</sup> defendant has failed to prove her claims in the counterclaim and the same is hereby dismissed. She has not right hence to the reliefs claimed in the counterclaim.

Having determined the evidence orally and documentary, before conclusion, I must commend all parties to the suit for their analysis of evidence and the authorities referred to the Court in their final submissions which was a great assistance to the Court in determination of this matter. Having said so, I hereby dismiss this suit in its entirety with costs. Right of appeal expressed accordingly.

It is so ordered.



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**A. MSAFIRI**  
**JUDGE**  
**29/11/2022**