

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

LAND CASE NO. 71 OF 2016

BRIGITA PAUL BILIA.....PLAINTIFF

VERSUS

**SELEMANI MUSTAFA IDDI.....1ST DEFENDANT
ATHANAS MICHAEL MUSHI.....2ND DEFENDANT
ACCESS BANK TANZIA LIMITED.....3RD DEFENDANT**

Date of Last Order: 11.04.2022

Date of Judgment: 31.05.2022

JUDGMENT

V.L. MAKANI, J

BRIGITA PAUL BILIA is the plaintiff in this suit. She is praying for judgement and decree against the defendants jointly and severally as follows:

- 1. For an order that the plaintiff is a bonafide purchaser of the suit property and which is free from any encumbrances.*
- 2. For declaration that plot No. 171 Block 8 with Certificate of Title No. 104422 is free from any mortgage and the purported mortgage created over the said property is illegal, null and void ab initio and or in alternative an*

- order that the 1st defendant reimburse the plaintiff with the purchase consideration.*
- 3. The notice of sale issued by the 1st defendant is not only illegal but also null and void ab initio.*
 - 4. For perpetual injunction to restrain the defendants and/or their agents from disposing of the suit property.*
 - 5. Costs of this case be provided for.*
 - 6. Any other or further relief as deemed appropriate by this honourable court.*

The matter proceeded ex-parte against the defendants who were duly served but never entered appearance at the time of hearing. The plaintiff was represented by Mr. Mashaka Ngole, Advocate and three witnesses were called including the plaintiff.

The framed issues were as follows:

- a) Whether the Third Party Mortgage created by Selemani Mustapha (the 1st Defendant & Guarantor) and the beneficiary, Athanas Michael Mushi (2nd Defendant & Borrower in favour of Access Bank (3rd Defendant) was valid. The security offered was Plot 171 Block 8 with Certificate of Title No. 104422 (the suit property).*
- b) Whether Notice of sale by the 3rd defendant (the Bank) to the 1st defendant was valid and effectual.*
- c) Whether the plaintiff is the bonafide purchaser of the suit property.*
- d) To what reliefs are parties entitled to.*

The first witness (**PW1**) was Palmon Martin Rwegoshora, Assistant Registrar of Titles, Dar es Salaam. He testified that initially the plot was owned by Augustino Boniface Lukosi then it was transferred to Selemani Mustapha Iddi in 2008. He said thereafter there was a transfer on Power of Sale to *My Contractors Limited* in 2016 who are the current owners. He went on saying that transfer on power of sale occurs when there is a mortgage, and the borrower has defaulted. He said according to the records Selemani Mustapha took a loan it was registered on 22/12/2004, the loan was from Access Bank Limited for unspecified amount. The transfer on power of sale was registered on 16/07/2017. He said upstamping of the mortgage happens when there is a registered loan and there is a further agreement between the parties to increase or reduce the loan amount and in the present case **PW1** said there was no upstamping of the loan. He said if power of sale is exercised there must be Certificate of Sale and Notification. He said there is Notification of 28/10/2016 from the Registrar of Titles to *My Contractors Limited* and copied to Access Bank and Augustino B. Lukosi. There is no notification in respect of Selemani Mustapha Iddi. On clarification questions **PW1** said the suit property was transferred from Augustion Lukosi to Selemani Mustapha Iddi on 12/12/2008 under love and affection.

PW2 was the plaintiff, Brigita Paulo Bilia. She said she bought the suit property from Selemani Mustapha Iddi at TZS 13,000,000/=. She deposited the amount of money in his account at CRDB Tabata Magengeni. She said there was a Sale Agreement between Selemani Mustapha Iddi and herself witnessed by an advocate. She went on saying that at the time of buying the suit property Selemani Mustafa Iddi told her that she had bought the land from Augustino Boniface and that once the process of transfer were complete he would give her the Certificate of Title to the suit property. **PW2** said after buying the suit plot in 2014 she started construction and completed in 2016 and moved in. She said she spent about TZS 120,000,000/= as construction costs. She said in 2015 Bank Officers from Access Bank brought a notice addressed to Selemani Mustapha Iddi that there is a default to the loan he had guaranteed. She said she refused to receive the notice, but they pushed it under the gate. She said the Notice reflected that one Athanas Mushi took a loan of TZS 100,000,000/= from Access Bank in 2015 and the guarantor was Selemani Mustapha Iddi and they wanted him to pay the loan because of the default. She said she searched for Selemani Mustapha Iddi but he was not available, however, she found his wife who told her that she does not

know the whereabouts of Selemani Mustapha Iddi because after receiving the sale amount he never returned home. She said she decided to go to the Lands Office where after the search she found out that the owner of the suit property was Selemani Mustapha Iddi and there was a mortgage in favour of Access Bank. She said in 2016 there was another notice with intention to auction the property and that is when she decided to come to court. She said when she did the search it showed that the loan was taken in 2014 while the initial notice was of 2015. She said the loan of 2015 in the notice was for TZS 100,000,000/= but she could not remember the amount for the 2014 loan. **PW2** alleged that the sale was for a loan which was not registered and so it was not legal. She filed this case in March, 2016 but *My Contractors Limited* bought the suit property in June, 2016 so the suit property was sold when this suit was pending in court. She prayed to the court to look at the ownership of the suit property that the sale was not proper as the local leader was not aware and further that the court declares the 2015 loan a nullity and also costs of this case to be paid by the Bank. On clarification questions by the court, **PW2** said that Selemani Mustapha Iddi has never given her the Certificate of Title to date since the sale of the suit property in

30/12/2013. She admitted that *My Contractor Limited* are now in the suit property and she prayed for the house to be returned to her.

PW2 tendered the Sale Agreement between herself and Selemani Mustapha Iddi (**Exhibit P1**), Notification of Disposition (Land Form No. 29) (**Exhibit P2**), Application of Approval of Disposition (Land Form No. 30) (**Exhibit P3**), Transfer of Right of Occupancy (Land Form No. 35) (**Exhibit P4**). The court also took for records documents from the file of the Registrar of Title namely Notification of Transfer under Power of Sale (**Exhibit C1**), Mortgage Deed between the Bank and Michael Mushi and Selemani Mustapha Iddi as the Guarantor (**Exhibit C2**) and Certificate of Title No. 104422 for the suit property (**Exhibit C3**).

Agnes Steven Mbagwa was **PW3**. She said she was the wife of Selemani Mustapha Iddi from 1996 until December, 2014 when he divorced her at Kawe Primary Court. She said the suit property was a family property and was given to Selemani Mustapha Iddi and his family in 2008. She said she was aware of the suit property, but she does not know the whereabouts of Selemani Mustapha Iddi from 2012 but in 2015 the plaintiff visited her in search of Selemani Mustapha

Iddi and told her she bought the suit property. She said she has never heard of the sale of the suit property and she has never visited the plot. She said at the moment she does not know the current whereabouts of Selemani Mustapha Iddi as there is no communication between them.

Final submissions on behalf of the plaintiff were filed by Mr. Ngole. Though the submissions were kind of mixed up, but my understanding of his arguments were that the sale was not proper because there was no proper notice according to section 132 and 127(1) of the Land Act CAP 113 RE 2019. He said the record and evidence does not reflect that there was any notice to remedy the breach. He invited the court to find that the sale of the suit property to a third party by the Bank is void under section 133(6) of the Land Act.

Mr. Ngole further submitted that the mortgage created by the 1st defendant in favour of the 3rd defendant was not valid because the wife of Selemani Mustapha Iddi was not aware of the mortgage and the property was a family property. He said there was no consent

from the spouse of Selemani Mustapha Iddi as required by the Law of Marriage Act CAP 29 RE 2019 so the mortgage was void ab initio.

Mr. Ngole further stated that the plaintiff's claim is that she is a bonafide purchaser of the suit property and she bought the property in good faith. He said in a situation where a seller behaves fraudulently the bonafide purchase is not responsible and the purchaser would be allowed to retain the property. He cited the case of **Suzan S. Waryona vs. Shija Dalawa, Civil Case No. 44 of 2017 (CAT)** and **Stanley Kalama Masiki vs. Chihiyo Kuiso w/o Nderingo Ngurumo (1981) TLR 143**. He said the plaintiff bought the suit property without any development, but after the purchase she developed the said suit property and constructed a house until in 2015 when she was notified of the mortgage by Selemani Mustapha Iddi after the suit property was sold to her.

Now, in determining this matter, I will be guided by the principle embodied in section 110 of the Evidence Act CAP 6 RE 2019 that whoever alleges must prove as asserted by Counsel for the parties. Section 110 of the of the Evidence Act. In the case of **Anthony M. Masanga vs. Penina Mama Mgesi & Lucia (Mama Anna) Civil**

Appeal No. 118 of 2014 (unreported) the Court of Appeal in underscoring this principle stated:

".....Let's begin by re-emphasizing the ever cherished principle of law that generally, in civil cases the burden of proof lies on the party who alleges in his favour." '

In this case the plaintiff had the duty to prove that she is the bonafide purchaser of the suit property and further that the mortgage entered between 2nd defendant and the Bank and the 1st defendant as the guarantor is not valid. What this court is to decide upon is whether the burden of proof has been sufficiently discharged.

I will deal with the issues raised generally as they are intertwined. I will start with the claim by the plaintiff that she is a bonafide purchaser of the suit land, and that whatever that transpired to the suit land, that is the mortgage, sale and transfer to the third is void ab initio.

The plaintiff in the written submissions pointed out the principles of bonafide purchaser set out in the case of **Suzana S. Waryoba** (supra). I agree to the set principles, however, the circumstances are different because in the present case the plaintiff bought the suit land on 30/12/2013. This was a direct sale between the plaintiff and the

1st defendant, there was no third party to make the plaintiff believe that the transaction was a fraud as in the cited case. The plaintiff had three years within which to exercise her right to transfer the suit property according to the Sale Agreement (**Exhibit P1**). Nevertheless, the plaintiff in her testimony said up to the date she was in court she did not have the Certificate of Title and that transfer of the suit property had not been transmitted in her name though in her evidence she tendered Land Forms filled in respect of the transfer (**Exhibits P2-P4**). It beats logic that a person would pay, enter to the suit property, and start developments without being in possession of a Certificate of Title. In my considered view, at the time of the sale between the plaintiff and the 1st defendant there was no fraud because the transaction was satisfactorily completed. Furthermore, the plaintiff with the assistance of the 1st defendant had a further duty to ensure that transfer is effected as per paragraph 5 and 6 of the Sale Agreement which states that:

" 5. This Agreement and the Deed of Transfer from the Vendor to Purchaser shall be subject to the approval of the Commissioner for Lands, and both parties hereto undertake to use reasonable endeavours to obtain such approval.

6. The purchaser [plaintiff] shall be liable to pay all necessary costs associated with transfer of the property that is approval, registration, valuation fees, stamp duty

and other charges incidental to the said transfer. Further the Vendor [1st defendant] agrees to assist the purchaser with all necessary formalities of the transaction to be completely successfully."

If there were any traits of fraud thereafter, then the plaintiff is to blame because she did not take any efforts to satisfy the obligation of ensuring that transfer is approved and that she is in possession of the Certificate of Title in her name. This reflects laxity on the part of the plaintiff and the failure to fulfil her obligations under the Sale Agreement cannot warrant her the comfort of being a bonafide purchaser. In other words, in the absence of transfer of the suit land in her name three years down the line the plaintiff cannot escape negligence which works to her detriment. She cannot equate that negligent act to protection under the cover of the bonafide purchaser as she successfully completed the sale transaction and had all the time and right to make good the title in her name. Unfortunately, she did not do so, subsequently the suit property is now in the name of *My Contractors Limited* as confirmed by **PW1**.

In the case of **Moshi Electrical Light Co. Limited & 2 Others, Land Case No. 55 of 2015 (HC-Mwanza)** (unreported) it was stated that the protection of a bonafide purchaser for value provided

under section 135 of the Land Act accrues upon registration and the transfer of the property in question to the bonafide purchaser. In the said case Hon. Maige, J (as he then was) when explaining the protection of bonafide purchasers under section 135 of the Land Act stated:

"Once the transfer is registered therefore, the sale becomes absolute such that it cannot be nullified at the instance of the mortgagor on account of any defect of the mortgagee title on the mortgaged property or any irregularities of any kind in the exercise of the power of sale except only where there is a proof of fraud, collusion or misrepresentation in the transfer transaction."

As said above there is no proof that transfer or registration of the suit property to the plaintiff was ever done. In the circumstances, the plaintiff cannot be accorded the protection under section 135 of the Land Act as a bonafide purchaser as argued by Mr. Ngole. In other words, there is no proof that title has passed from the 1st defendant to the plaintiff.

Now, was the mortgage and the subsequent notice of sale proper? In my view, since it has been established that the plaintiff was not a bonafide purchaser and therefore she had not title to the suit property, then the plaintiff is not privy to all the transactions made between the 1st defendant and the Bank. Presumably, that is why the

plaintiff in her testimony could not explain properly and she did not have any documents to support the transaction related to the mortgage as she was not party to any of the transactions. The plaintiff said there was no proper notice, and this was also argued by Mr. Ngole in the written submissions, but with due respect, notice is supposed to be issued to the guarantor who at that particular time was the 1st defendant. In any case, according to the plaintiff she received the notice of default and therefore she knew there was a loan, that is why she started searching for the 1st defendant, his wife and the Bank.

In discrediting the Mortgage, Mr. Ngole submitted that there was no consent from the 1st defendant's wife, the subject land being a matrimonial property under the Law of Marriage Act. Nonetheless, this is a statement from the bar because **PW3** who alleged to be the 1st defendant's wife was not led to testify to the fact that the suit property was a matrimonial home and further that there was a need for her to give. Further and with due respect to Mr. Ngole, there is no proof whatsoever that **PW3** was the wife of the 1st defendant and they had divorced. She generally said she was the wife and was divorced in December, 2014. But the court expected to see a

Marriage Certificate or a Decree of Divorce tendered in court to support the fact that **PW3** was the wife of the 1st defendant. Failure to have such proof means that the court cannot state with certainty that **PW3** was the wife of the 1st defendant and she was supposed to give consent to the mortgage. In the result the plaintiff's argument on the mortgage and subsequent transactions have no basis and are rejected.

There was also the issue raised by the plaintiff in her testimony that there were two loan agreements of 2014 and 2015. As said, who alleges must prove. There was no proof of these allegations and though there was an attempt to connect the two loans with the issue of upstamping by **PW1**, but the attempt was unclear as there were no supporting documents and Counsel failed to lead witnesses to establish the connection therein. In view thereof, I hold that the plaintiff has failed to prove that the mortgage by the 1st defendant to the Bank is invalid.

For the reasons I have endeavoured to address, it is apparent that the plaintiff has failed to prove the case to the standards of law required of balance of probabilities. Consequently, the plaintiff is not

entitled to the reliefs prayed in the plaint or at all. The suit is thus dismissed with costs.

It is so ordered.


V.L. MAKANI
JUDGE
31/05/2022

