

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

LAND CASE NO. 06 OF 2020

MARY F. MDAWA @ MARIA DAFROSA MAMROSO PLAINTIFF

VERSUS

BANK OF AFRICA TANZANIA LIMITED 1ST DEFENDANT

FRANCIS VENANCE t/a SIYA 2ND DEFENDANT

BEST GROUP (T) LTD 3RD DEFENDANT

AL-AMIN MOHAMED LWANO 4TH DEFENDANT

JUDGEMENT

A. MSAFIRI, J

The plaintiff have instituted a case against the defendants. She claims that the 2nd defendant is her lawful husband and they were married in 19/11/1998. That their matrimonial home was at Plot No. 253 Block B, Sinza Area, in Dar es Salaam. The plaintiff claimed further that in the year 2016, she discovered that her husband, the 2nd defendant has obtained loan from the 1st defendant (Bank of Africa Tanzania Limited- BOA Bank who is the 1st defendant), amounting to Tshs 80,000,000/- and that he has mortgaged their matrimonial house (herein as suit premises or suit property) and that the said 2nd defendant has defaulted to pay the loan. *Alls.*

That, on the discovery, the plaintiff filed a caveat in respect of suit property dated 15/11/2016. That, she discovered that upon the 2nd defendant's failure to pay the loan, the 1st defendant engaged the 3rd defendant who sold the suit property to the 4th defendant on 19/10/2016. She stated that, she has never consented to the mortgage of her matrimonial house.

Her prayers for the judgement and decree against the defendants are as follows:-

- a) The Court to nullify the mortgage deed between the 1st and 2nd defendants for lack of the plaintiff's consent.
- b) The Court to nullify the sale of the suit property which was done by the 3rd defendant in favour of 4th defendant.
- c) The Court to declare any transfer of suit property made in favour of the 4th defendant to be illegal.
- d) The Court to order the 4th defendant to immediately vacate the suit property and restoration of the same to the plaintiff.
- e) Payment of general damages to the plaintiff who is homeless with her family.
- f) Any other reliefs to be determined by the Court.

The 1st, 3rd and 4th defendants in their Joint Written Statement of Defence vehemently denied the plaintiff's claims and put her to strict proof. They insisted that the plaintiff consented to the mortgage of the suit property. They prayed for the suit to be dismissed in its entirety with costs. *Alls-*

The 2nd defendant who is the plaintiff's husband never entered appearance in Court, nor filed his defence. After having been summoned to enter appearance in Court and defaulted, the Court ordered for substituted service by publication which was done. The summons was published in Raia Mwema Newspaper dated 06/10/2021, and on 08/11/2021, the Court ordered for the proceedings to continue in absence of the 2nd defendant.

Before commencing the trial, three legal issues were agreed upon by the parties and passed by the Court;

1. Whether the plaintiff consented to the mortgage of the suit property by the 2nd defendant to the 1st defendant.
2. If the 1st issue is answered in affirmative, whether the subsequent transfer of ownership of the suit property from the original owner (2nd defendant) to the 1st defendant and then to the 4th defendant is valid.
3. To what reliefs are the parties entitled to.

During the hearing, Mr. Hashim Mziray, learned advocate appeared for the plaintiff, whereas the 1st, 3rd and 4th defendants were represented by Mr. Godwin Mganyizi, learned advocate.

In determining the case before me, I will start with the first issue as to whether the plaintiff consented to the mortgage of the suit property. To support her claims that she never consented to the said mortgage, the plaintiff had a total of four witnesses who testified for her including herself. *Allo-*

In her testimony as PW1, the plaintiff stated that she met the 2nd defendant in 1981 and were married under customary marriage in the same year, and started living together. She said that she got the suit premises in 1990 where they (she and 2nd defendant) bought a plot jointly. The plot was registered under the name of the 2nd defendant. She stated further that they jointly collected the money and started building the suit premises which was later improved from a small three bedroom house to much bigger house with four bedrooms and a fence. PW1 said that she tied the knot with the 2nd defendant at the Roman Catholic Church, Mrao, Kilimanjaro Region in 19/11/1998.

She said that in 2016, she got information from the 1st defendant (Bank of Africa Tanzania Limited – BOA Bank) that the suit property has been mortgaged as a security for loan. That, the BOA Bank Officer told her that her husband Francis Venance is the one who mortgaged the house and has defaulted on loan payment. She said further that, the loan officer told her that the loan was Tshs. 80,000,000/-, while in 2016, the suit property was valued at Tshs. 400,000,000/-.

She stated that she was not informed by her husband about the loan, she was never consulted on the loan and she has not consented to the issue of the loan. She added that, after that information, she filed and entered a caveat which was registered on 17/11/2016. *Atle*

She stated that, on 12/4/2017, the 3rd defendant, under instructions of the 4th defendant, invaded the suit property and forcefully evicted the plaintiff with her family. She said that she was told that the suit property is now registered under the name of Al-Amin Mohamed Lwano (the 4th defendant).

She maintained that, she has never consented for her matrimonial house to be mortgaged, and that the claims that on 11/9/2013 she gave her consent before one advocate Ambrose Malamsha are not true. She stated that, she has never signed the consent or any agreement concerning the suit property.

About the passport size photos, she admitted that they belong to her but they are her picture during her young age. She insisted that she has never given her passport size photos to any advocate for the purpose of spouse consent. She added that she has never went to any Bank to sign on the loan or mortgage agreements. She said that the suit property was sold at Tshs. 80,000,000/- which is below the value of the suit property.

She prayed for the Court to nullify the transfer of ownership of the house from the 2nd defendant and the 4th defendant. She prayed for general damages. To cement her evidence, she tendered a photocopy of certificate of Title which was admitted as Exhibit P1, and Caveat which was admitted as Exhibit P2. Her attempt to tender a photocopy of Marriage Certificate did not succeed as the same was objected by the defence. On that, the Court ordered that the Officer from RITA, the custodian of marriage certificates, should be the one to come and tender the same. *Acts*

In cross examination, PW1 stated that she did not know that there was a Notice from the Registrar of Titles to revoke the caveat (Exhibit P2) she has entered on the suit property. On the value of the house, she said that it was valued at Tshs. 400,000,000/- but admitted to have not valued the suit property, nor was she in possession of the Valuation Report on the suit premises. She just said she knew the building expenses.

She said further that her husband the 2nd defendant left their home and she does not know his whereabouts. That she has reported the missing husband to the local Government Street Offices.

In order to determine the first issue, it has to be established whether the plaintiff is a legal wife of the 2nd defendant in terms of the Marriage Act, Cap 29 R.E 2019. In her evidence, PW1 stated that the suit property is a matrimonial property which was jointly acquired by the plaintiff and 2nd defendant as spouses although the suit property was in the name of the 2nd defendant.

In their Written Statement of Defence, the 1st, 3rd and 4th defendants contended that the suit premises was purchased in the year 1991, seven years before the plaintiff could have been married to the 2nd defendant so, the suit property belongs solely to the 2nd defendant. The said defendants, in their final submissions averred that, the plaintiff have testified that she lived with the 2nd defendant in concubinage since 1981 and thereafter they had customary marriage which was followed by Christian marriage in 1998. *Atts.*

However, no proof of customary marriage was forwarded. Also, they contended that no proof was tendered that the plaintiff ever contributed to the buying and building the suit property.

In her evidence as PW1, the plaintiff stated that they jointly contributed to the buying of the suit premises and started building a house on suit property in 1990. At that time, they were living together as spouses although the official marriage was done in 1998.

The evidence of PW1 was corroborated by PW2 Aidan John Bondo who testified that, he is a neighbour of the plaintiff and that he lives in a nearby street to the one where the plaintiff used to live with her husband. He said that he knows the suit property and that it was jointly owned by the 2nd defendant with his wife the plaintiff. PW2 said further that he witnessed the plaintiff and her husband when they were building the suit property. That, he has lived at Sinza, near where the suit premises was located, and had known the plaintiff for a long time.

I am satisfied with the evidence of PW1 and PW2 that the plaintiff and her husband the 2nd defendant were living as husband and wife way back before their official Christian marriage in 1998.

It is true that the certificate of Title Exhibit P1 shows that the property in dispute was acquired in 1991, but that date was when the property was registered and the ownership Title was acquired. According to PW1 and PW2,

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the property was acquired before 1991 as the house on the disputed plot was built in 1990.

Section 160 of the Marriage Act, provides that; where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being wife and husband, there shall be a rebuttable presumption that they were duly married. Basing on this provision, it is my finding that, the plaintiff and her husband were duly married under presumption of marriage and they have acquired the suit property together.

Having found that the plaintiff and 2nd defendant were duly married and hence the suit property was marital property, I will now have a look on the first issue in this case on whether the plaintiff gave her consent to the mortgage as per section 59 of the Marriage Act. Section 59(1) of the said Act provides that;

"Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being enforce relating to the registration of title to land or of deeds".
(Emphasis supplied). *Alle*

In the present matter, the plaintiff contends that, she has never gave her consent for the matrimonial suit property to be mortgaged.

The defendants stated in their written statement of defence that, the plaintiff consented to the mortgage of the suit property as a spouse of the 2nd defendant. This was supported by the evidence of DW2 one Shadrack Manyama, a Manager of Legal Services at the 1st defendant Bank. He testified before the Court that, when BOA Bank was issuing a loan to the 2nd defendant, they received a spouse consent from the plaintiff consenting on the loan, and creation of mortgage in favour of BOA Bank. That the said consent was issued by the plaintiff, and it was signed on 11/9/2013, and that it has a passport size picture of the plaintiff. The consent was admitted in court as Exhibit D2.

DW2 stated further that it was the 2nd defendant who brought Exhibit D2 to the Bank. He added that, the BOA Bank has other consents of the plaintiff all on the suit premises. The other consents dated 26/2/2010, 18/11/2011, 14/9/2012 and 15/8/2012 were all claimed to be issued by the plaintiff. They were admitted collectively in court for identification purpose as "ID1".

DW2 went on to submit on the procedures which the Bank follows when processing loan for a client. He stated that, when a client applies for loan, he has to bring to the Bank all necessary documents which the Bank may have directed him/her to bring. That, one of the necessary documents is a spouse consent which has to be signed before and attested by the

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Commissioner for Oath, and that the picture of the consenting person has to be attached to the said consent and the same has to be signed by the person consenting.

DW2 stated further that, the Bank also requires the client to have Certificate of Marriage (if he/she is married), the National Identity Card or the Voter Registration Card. He said that, all these documents are brought by the client who come to apply for the loan and were complied with by the 2nd defendant. He maintained that, the plaintiff knew that there was a loan and the house in dispute was set as security and she consented to the mortgage.

In cross examination by the advocate for the plaintiff, the witness was shown by the said advocate, the purported signatures on the Exhibit D2 and ID1 and asked on the difference on formatting of letters on the signatures. He responded that every person has his or her own style of handwriting and he cannot know whether the signatures are different because he is not a handwriting expert.

The plaintiff is denying to have signed the signature which is seen on Exhibit D2 although she admits that the attached passport size photo belongs to her. She explained that her husband, stole the said pictures from their home without her knowledge.

Going through the evidence of the plaintiff, from the contents of her plaint, to her testimony in court to the final submissions by her advocate, the

plaintiff is contesting the signatures on Exhibit D2. By that evidence, the plaintiff claims that the signatures on exhibit D2 does not belong to her. Therefore, there is an issue of forged signatures whereby someone else signed the disputed document posing as the plaintiff.

It is trite law that whoever desires a Court to give judgment in his/ her favour, he/she must prove that those facts exist. This is provided under Sections 110 (1) (2) and 112 of the Evidence Act, Cap 6 R.E 2019.

Section 112 of the Evidence Act provides that;

"The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person".

The condition of proving a fact was observed by the Court of Appeal in the case of **Ernest Sebastian Mbele vs. Sebastian Sebastian Mbele & 2 others**, Civil Appeal No. 66 of 2019 CAT at Iringa (unreported), where the Court held that;

"The law places a burden of proof upon a person who desires Court to give judgment and such a person who asserts the existence of facts to prove that those facts exists. (Section 110(1) and (2) of Evidence Act). Such facts is said to be proved when, in civil matters, its existence is established by a preponderance of probability. (see Section 3 of the Evidence Act, Cap 6)." *Adls*

The Court of Appeal in the cited case further quoted with respect, their decision in the case of **Godfrey Sayi vs. Anna Siame as Legal Representative of the late Mary Mndolwa**, Civil Appeal No. 114 of 2012 (unreported) where it said;

"It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities"

Basing on the above set principles, it goes without doubt that in the case at hand, the burden of proving the existence facts which the plaintiff asserts lies on her. The plaintiff claims that, she didn't consent to the mortgage of the disputed property and that the signature on Exhibit D2 is not hers.

However, the plaintiff has failed to prove to the Court that indeed, she did not consent to the mortgage and she did not sign the document titled "*consent of spouse to create mortgage in favour of Bank of Africa Tanzania Limited*" (Exhibit D2). The contents of the said document shows that, Mary F. Mdawa, of P.O. Box 61180 Dar es Salaam, wife of Francis Venance and lawfully beneficiary of Block B. Sinza Area, Kinondoni Municipality, Dar es Salaam City, gave her consent and mortgage the suit property to the Bank as security for the credit facility to be extended to Francis Venance. The document was signed and the passport size photo of the plaintiff was attached and stamped by the Commissioner for Oaths. *Aelle*

When there is a claim of fraud that is raised in a civil case, the standard of proof is higher than it is in normal civil cases, given its criminality. The plaintiff did not produce any other evidence except her sole oral evidence that the signature on Exhibit D2 is not hers hence it was forged.

It was held in the case of **Omari Yusufu vs. Rahma Ahmed Abdulkadr** (1987) TLR 169 (CA), that;

"When the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases."

On the above principle, the claim that the consent contained forged signature can not be proved by mere words of the plaintiff. The plaintiff has not demonstrated whether she has taken any action about the forged signatures like reporting the matter to the Police authorities complaining about the forged document. She just insisted that the signature and handwriting on the consent are not hers. In absence of supporting proof beside the mere words of the plaintiff, this Court finds that the plaintiff has failed to discharge the burden of proof on her part.

I observed the counsel for the plaintiff, when cross examining DW2, was trying to establish that there is a difference between the signatures on Exhibit D2, and the plaint. The counsel also questioned the witness on the similarities of vowels and consonants on the tendered documents in respect

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of purported forged signatures of the plaintiff. However, this witness was not a hand writing expert so he could not be of any help to the counsel.

In order to cement her claim, the plaintiff was supposed to prove to a higher standard that the disputed document was forged and the signatures on the said document was not hers. Since she has failed to discharge the burden of proof then the facts remain that the plaintiff gave a consent as per Exhibit D2. The first issue is answered in the affirmative.

The second issue is whether the subsequent transfer of ownership of the suit property from the original owner (2nd defendant) to the 1st defendant and then to the 4th defendant is valid.

In the plaint, the plaintiff seeks for the orders of the court to nullify the sale of the suit property and declare any transfer made in favour of the 4th defendant, illegal. In her evidence, the plaintiff testifying as PW1, stated that in 2016, she discovered that the 2nd defendant has obtained loan from the 1st defendant, a loan which she did not consent. That, after discovery of the existence of the mortgage which she did not consent, she registered a caveat in respect of suit property. The said caveat was tendered by the plaintiff and admitted in Court as Exhibit P2. It was registered by the Land Registry Office, Dar es Salaam in 17/11/2016. She said that on 12/4/2017, she was evicted forcefully from the suit property after the house in dispute was sold to the 4th defendant. She stated further that as of now, the house in dispute is registered in the name of the 4th defendant.

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In cross examination, she averred that, she has entered the said caveat to stop the transfer of property but they nevertheless did the transfer. She averred that, it was the land authorities which transferred the ownership of the suit property illegally.

On the defence part, they argued that the transfer was legal as per the provisions of the Land Registration Act, Cap 334, and that it was done after the plaintiff and her husband (2nd defendant) has defaulted on loan payment. This was cemented by the evidence of DW1 one Waziri Masudi Mganga, an officer from the Office of Registrar of Titles, who stated that the Registrar of Titles received an application for transfer of ownership of the suit property. That, the transfer was from the ownership by Francis Venance to the current owner who is Al Amin Mohamed Lwano (4th defendant).

DW1 said that before processing the application for transfer, the office of Registrar of Titles issued a 30 days' Notice to the person who has registered a Caveat on the suit property, (in this matter the plaintiff), informing her of the intention to transfer ownership unless there was a High Court injunction order. He tendered a photocopy of the Notice which was admitted in Court as Exhibit D1. The witness averred that, the original document is in possession of the plaintiff as it was sent to her through her postal address which is P.O. Box 42927 Dar es Salaam. That, the address was retrieved from the plaintiff's caveat Notice and the Registrar's Notice to the Caveator (plaintiff) was signed on 25/01/2017 while the transfer of ownership was registered on 19/12/2016.

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I have looked at Exhibit D1, it is dated 25/01/2017 and is addressed to the plaintiff. It gives Notice to the plaintiff that the Registrar of Titles intends to register the transfer of Right of occupancy within thirty days from the date of posting/dispatch of the Notice and the registered caveat will lapse unless within that period, the High Court orders otherwise.

However, from the evidence, there was no High Court order to direct the Registrar of Titles not to transfer the ownership on the suit property. The applicant filed for an application for temporary injunction orders before this Court on 13/6/2017, and the application was dismissed in 03/10/2019. Therefore, when the transfer was done, there was no this Court's order to restrain or stop the transfer.

Section 78(6) of the Land Registration Act, provides that;

"Where a deed is presented for registration which purports or appears to affect any registered estate or interest in respect of which a caveat is entered, the Registrar shall give notice thereof to the caveator and shall suspend registration of such deed for one month from the date of such notice, and at the expiration of such period the caveat shall lapse and the deed shall be registered as at the date of presentation unless in the meanwhile the application for registration has been withdrawn or the High Court otherwise directs".

From the evidence, the Registrar of Titles complied within the provisions of Section 78(6) of the above Act. The defendants have established that Exhibit *Alle*.

D1, the Caveat Notice was served through post office to the plaintiff although this fact is being denied by the plaintiff.

On the issue of the illegal sale of the suit property which was claimed by the plaintiff, it is my view that the sale was lawful. The base of the plaintiff's claim was that; the sale was done while there was already a caveat entered by the plaintiff on the suit property. However, according to exhibit P2, the said caveat was entered on 15/11/2016, while according to the plaintiff's evidence particularly in the plaint it is said that the suit property was sold to the 4th defendant on 19/10/2016. By these dates, it is clear that by the time the plaintiff was entering/registering a caveat on the suit property, the same was already sold to the 4th defendant. I find that there is no evidence on the illegality of the sale as the plaintiff has not raised any complaint on the illegality of the auction.

I also find that, the procedure for transfer of ownership of the suit property were complied with. This is for the reasons I have explained above and for the fact that, the 2nd defendant having defaulted on payment of loan, the sale of a mortgaged facility was inevitable.

The plaintiff has also raised the issue of value of the suit property. The plaint shows that the suit premises was valued at Tshs. 400,000,000/- she said however that, she does not have any Value Report but she knows the building expenses. She claimed that the suit premises were sold at Tshs. 80,000,000/- which is below the value of the house. The defendants counter

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the plaintiff's claims, by tendering the Valuation Report on the suit property which was admitted for identification as "ID2".

DW2 also told the Court that the house in dispute was evaluated and was found to have market value of Tshs. 165 million, and Forced Sale value of Tshs. 140 million. It was sold at the public auction and bought by the 4th defendant who was the highest bidder. The plaintiff has also failed to establish her claims that the house in dispute is worth Tshs. 400 million.

Basing on the above analysis, the 2nd issue is also answered in the affirmative that the transfer of ownership of the suit property was valid.

The 3rd issue is to what reliefs are the parties entitled to.

The plaintiffs sought for relief as stipulated in the plaint and hereinabove. The reliefs are briefly that; the Court to nullify the mortgage between the 1st & 2nd defendants for the lack of consent. The court's finding on this is that there was a valid consent from the plaintiff as her claims that she did not make or sign the consent was not proved. Therefore, the plaintiff is not entitled to this relief.

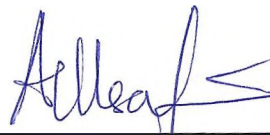
The plaintiff has also sought for the Court order to nullify the sale of the suit property and declare any transfer of ownership to be illegal. This Court also finds that the sale was legal after the 2nd defendant who is the husband of the plaintiff has defaulted on loan payment. The Court has also found that the transfer of ownership of the suit property was legal as all the proper

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procedures were followed as per the requirement of the law. To sum up on this issue, the plaintiff is not entitled to any of the reliefs claimed in the plaint.

As for the defendants, they have prayed for the dismissal of the suit in its entirety with costs.

I hereby dismiss this suit in its entirety. I make no order for the costs since the plaintiff is under legal aid.



A. MSAFIRI,
JUDGE
28/07/2022