

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

**LAND CASE NO. 175 OF 2018**

**MUDRICK RASHID KHAMIS** (Administrator of the Estate of  
**ASHA ABDUL- RAHMAN)** ..... **1<sup>ST</sup> PLAINTIFF**  
**EDWARD EUGEN MUSHI** ..... **2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**INTERNATIONAL COMMERCIAL BANK  
(TANZANIA) LIMITED** ..... **1<sup>ST</sup> DEFENDANT**  
**ASIA HASSAN** ..... **2<sup>ND</sup> DEFENDANT**  
**V.D ENTERPRISES COMPANY LIMITED** ..... **3<sup>RD</sup> DEFENDANT**  
**MITUL SHAH** ..... **4<sup>TH</sup> DEFENDANT**  
**INDUMAT SHAH** ..... **5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

*Date of Last Order: 20/01/2022*  
*Date of Judgment: 27/01/2022*

**A. MSAFIRI, J**

The plaintiffs Mudrick Rashid Khamis as administrator of the estates of Asha Abdul – Rahman, and Edward Eugen Mushi have instituted the suit against the defendants namely International Commercial Bank (Tanzania) Limited) (1<sup>st</sup> defendant), Asia Hassan, (2<sup>nd</sup> defendant), V.D. Enterprises Company Limited (3<sup>rd</sup> defendant), Mitul Shah, (4<sup>th</sup> defendant) and Indumat Shah (5<sup>th</sup> defendant).

*Aale*

The plaintiffs are praying for the Judgment and Decree against the defendants jointly and severally as follows:

- (i) Declaration that Plot No. 22 Block 5 Kariakoo Area Dar es Salaam is a property of the late ASHA ABDRAHAMANI who was also known as ASHA ABDUL RAHMAN and the same has never been mortgaged to the registered owner or her successor in title.
- (ii) Declaration that the whole process of mortgage transactions between the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant and purported to be secured by Plot No. 22 Block 5 Kariakoo Area, Dar es Salaam is null and void ab initio.
- (iii) An Order for rectification of the land register of Plot No. 22 Block 5 under Certificate of Title Number 46313, Kariakoo Area, Dar es Salaam in respect of the void mortgage transaction between the defendants.
- (iv) Payment of general damages of the tune of Tshs 500,000,000/-.
- (v) Payment of the costs of the suit.


The factual claims constituting the case of the plaintiffs are pleaded in their Plaint. The plaintiffs' claims that, sometime in April 2012, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendant unlawfully mortgaged the landed property known as Plot No. 22 Block 5 Kariakoo Area (herein referred as suit property) to the 1<sup>st</sup> defendant. That, in the said transaction, the 2<sup>nd</sup> defendant represented herself as ASHA ABDRAHAMANI and executed mortgage documents in favour of the 3<sup>rd</sup> defendant. That, at the material

*Atts.*

time, the said ASHA ABDRAHAMANI had already passed away since 25/3/1996.

It is claimed by the plaintiffs that the late Asha Abdul- Rahman referred in the Death Certificate No. 00106081 dated 27<sup>th</sup> April 2007 and letter of administration issued on the 21<sup>st</sup> May 2009 is the same person referred in the Title Deed comprising Plot No. 22 Block 5 Kariakoo Area, Dar es Salaam in the name of Asha Abdrahamani, and that the said name had been used interchangeably due to similarity in pronunciation.

The plaintiffs claims further that they were aware that the original Title Deed of the Plot No. 22 Block 5 Kariakoo area, Dar es Salaam was lost when the same was used as surety bond in Criminal Case No. 439 of 2009 at the District Court of Ilala and the due process of obtaining a new Title was underway.

That, surprisingly, while making follow up on the issuance of the new Title Deed for the suit property, they were informed by the Registrar of Titles that the said property had been mortgaged on 30/12/2012 in favour of the 3<sup>rd</sup> defendant. The plaintiffs discovered further that there was impersonation of the late Asha Abdul-Rahman by the 2<sup>nd</sup> defendant and the passport size photo attached to the mortgage documents are not true likeness of the late Asha Abdul – Rahman but they are the true likeness of the 2<sup>nd</sup> defendant. And that the whole process of mortgage transactions between the 1<sup>st</sup> and 3<sup>rd</sup> defendants which was purported to be secured by the suit property is null and void. 

The 1<sup>st</sup> defendant filed her written statement of defence on which she vehemently denied the allegations and put the plaintiff into strict proof. The 1<sup>st</sup> defendant stated further that the suit property was mortgaged to the 1<sup>st</sup> defendant by the lawful owner of the same, Asha Abdrahamani and thus the mortgaged transaction is valid. That, the names of Asha Abdrahamani and Asha Abdul-Rahman are two different names and of the different persons. That, on 19<sup>th</sup> July, 2013, the 1<sup>st</sup> defendant instituted a Commercial Case No. 83 of 2013 by way of summary suit against the lawful owner of the property, borrowers and guarantors. On 25<sup>th</sup> September 2013, the High Court Commercial Division, entered a decree in favour the 1<sup>st</sup> defendant which entitled her to dispose of the suit property.

The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants also filed their joint written statement of defence on which they denied the allegations, stating that the plaintiffs has no cause of action against them and put the same into strict proof. They also raised the preliminary objections, however, after hearing of both parties, the court find the objections to be lacking merits and they were overruled with costs on 04<sup>th</sup> June, 2020.

The 2<sup>nd</sup> defendant failed to file her written statement of defence within statutory time and failed to appear before the Court despite being summoned several times. Also, as per the order of the court, she was served through substituted service on a local newspaper but she did not respond. Therefore, the matter proceeded ex-parte against the 2<sup>nd</sup> defendant.

*Aills*

At the final pretrial conference, the following issues were framed for determination;

- 1. Whether Asha Abdul Rahman and Asha Abdrahamani referred to in paragraph 7 of the Plaint and paragraph 4 of the 1<sup>st</sup> defendant's Written Statement of Defence are one and the same person.*
- 2. Who is the lawful owner of the suit property?*
- 3. On account of the second issue, whether the 1<sup>st</sup> plaintiff, guaranteed the facility to the 3<sup>rd</sup> defendant by the 1<sup>st</sup> defendant by mortgaging the suit property as security and whether the said mortgage agreement is lawful.*
- 4. Whether the 2<sup>nd</sup> plaintiff has cause of action against the defendants.*
- 5. To what relief(s) are the parties entitled to?*

At the hearing, the plaintiffs were represented by Mr. Emmanuel Kessy, advocate, Mr. Richard Madibi, advocate appeared for the 1<sup>st</sup> defendant, and Ms. Levina Kagashe and later Mr. Gabriel Mnyeale advocates appeared for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.

On the plaintiff's case, led by Mr. Kessy, the 1<sup>st</sup> plaintiff testified as PW1. He stated that Asha Abdulrahman was his biological mother, and he is the only child. That, this Asha Abdulrahman is now deceased and she died in the year 1996. He tendered a copy of Death Certificate of the deceased Asha Abdul-Rahman dated 27/04/2007 with serial No. 0010681 which was admitted in Court as Exhibit P1.

*Adls.*

He stated further that his mother left one house which is located at Kariakoo, Plot No. 22 Block 5 (herein as suit property) and that he was the sole heir of his mother's estate.

PW1 said that, after the death of his mother, he was appointed an administrator of her estate by Kariakoo Primary Court. He tendered a copy of letters of administration in Probate Cause No. 38/2009 issued to him as administrator of the estate of the deceased Asha Abdul – Rahman on 21/05/2009 which was admitted in Court as Exhibit P2.

PW1 stated that, in the same year he was appointed as administrator, he went to guarantee as surety his relative who was facing criminal case at Ilala District Court, the relative's name was Juma Salum Mbala. That he used the Certificate of Title in the name of his deceased mother as surety in that case. That, that relative was released but after a short while, he passed away. That, in 2011 September, PW1 wrote a letter to the District Court asking for the Certificate of Title which he has used to guarantee the relative who has now passed away. That after three months of following the matter up in Court, PW1 was informed that the Title was lost and that he should report the matter to the Police.

PW1 told the court that, he reported the matter to Msimbazi Police and was issued with a loss report. He tendered the Loss Report dated 14/12/2011 for the loss of Certificate of Title in the name of Asha Abdul Rahman which was admitted in Court as Exhibit P3.

*Aub.*

He stated that, after receiving the loss report, he went back to the Court and was issued with a letter by the Ilala District Court to take to Land Offices. He tendered the said letter from Ilala District Court dated 14/12/2011 which was admitted in Court as Exhibit P4.

PW1 stated further that, after receiving the letter and loss report, he went to the Land Office but he was told that the said documents were incomplete and advised to go back and collect a certain letter from the advocate. That he did not make further follow up on the Title and decided to sell the property.

That, he informed the purchaser/buyer of the suit property that the Title on the same was lost so he decided to make a follow up at the Land Offices. At the Land Offices, PW1 and the buyer (the 2<sup>nd</sup> plaintiff) were informed that the Title was mortgaged to the International Commercial Bank (ICB Bank). They went at ICB Bank and the Bank confirmed that indeed the Title was in their custody and that it was the owner of the property Asha Abdulrahman who mortgaged it and that she was a shareholder in the company VD Enterprises.( 3<sup>rd</sup> defendant).

PW1 stated further that, after receiving that information, he lodged a complaint at Msimbazi Police Station which is pending until now. That, he eventually came to learn that there is a person called Asia Hassan who presented herself to ICB Bank as Asha Abdrahaman. That Asia Hassan was arrested and taken to Msimbazi where she confessed that she was not Asha Abdul Rahman.

*Alls.*



He prayed that this court finds that his late mother did not guarantee anyone at the bank or took any loan. He also prayed that the certificate of title be given back to him because the mortgage was not valid as it was entered on 2012 while his mother died in 1996.

In cross examination by Mr. Madibi, PW1 stated that his mother's full name was Asha Abdurahman Ali Twalib. That in Exhibit P1 his mother's name is Asha Abdul Rahman. He admitted that he did not bring any Title Deed here in court, and that the names of his mother in Title Deed are not the same.

He stated further that he deposited the Title at the District Court as surety for his relative Juma Saidi Mbala. He admitted that he has no any copy of judgment, order or charge sheet to show that there was that case in the said Court. He admitted again that he did not produce in the Court, a letter which he wrote to the District Court to demand for the Certificate of Title. He responded that, in the Loss Report (Exhibit P3), the name of his mother reads Asha Abdrahamani which is different from other documents. And that in Exhibit P3, there is no description of the suit property.

PW1 said that, he sold the property in dispute to Eugene Edward Mushi (2<sup>nd</sup> plaintiff) because he was the sole heir and administrator of the deceased estate. That after being informed at the ICB Bank that the Title Deed was mortgaged, he did not write any letter to ICB Bank on the issue of the lost title deed.

*Ade*



On re-examination, PW1 stated that the difference in the names of his mother are normal as people write it differently some write it Abdul – Rahman and some write it Abdrahaman and that it is just typing errors.

Edward Eugene Mushi who is the second plaintiff testified as PW2. He said that he is a businessman at Ilala, Kariakoo and Kinondoni, Dar es Salaam. That he has a company called Kuringe Real Estate and they deal with construction and they also buy and sell land properties.

He said further that he knows PW1 since the year 2000 and his uncle one Thomas Chuwa is renting in PW1's house which is situated at Plot No. 22 Block 5 Kipata with Title No. 46313. That in 2009, he and PW1 entered an agreement to build the house on the said plot by joint venture and that, PW2 was to construct the house and PW1 will have his share on the land that the building will be erected on.

He said that, PW1 brought his documents including the original title for purpose of preparing the agreement and applying for building permit. That while the process was going on, PW1 came with a family problem and requested for the Title Deed so that he can go and guarantee his relative who had a criminal case, and that the Court has ordered that they deposit a Title Deed. PW2 said that he gave PW1 and his relative the said Title. That after a lapse of about one and a half year, they claimed that the Title Deed was lost and they (PW1 and his relative) told him that they now wanted to sell the property to him instead of entering a joint venture.

*Alle.*



He stated that on 12<sup>th</sup> January 2012, he entered into a sale agreement by PW1 and his relative whereby they sold him the suit property. He tendered the sale agreement between him and PW1 which was admitted as Exhibit P5.

PW2 stated that he was satisfied that PW1 was a lawful administrator of the estate of his late mother when he saw the letter of administration and the death certificate. He identified both Exhibit P1 and Exhibit P2.

He stated further that when making a follow up on the lost Title Deed, he conducted an official search in which he realized that the said Title was mortgaged for a loan. That the search was for suit property, and it was conducted by his wife one Hilda Raphael Soka. He tendered the search report for Title No. 46313 dated 30/07/2013 and it was admitted in Court as Exhibit P6. He said that, Exhibit P6 shows that the suit property was mortgaged on 30/04/2012 while the plaintiffs entered the sale agreement in January 2012, therefore, the sale agreement was executed before the mortgage. And they decided to enter a caveat on the suit property. He prayed that justice should be done for each party.

On cross-examination, PW2 stated that Mudrick (1<sup>st</sup> plaintiff- PW1) is administrator of the estate of his late mother Asha Abdulrahman. That the names in Exhibit P1, Exhibit P2 and Exhibit P5 are different from the name in Exhibit P6. He averred that the names are the same. The plaintiffs closed their case.

*Aills*



On the defence, the 1<sup>st</sup> defendant opened her case by the testimony of Carlos Maulid Valimba, who testified as DW1 that he works at ICB Bank as a Loan Officer. That, he started working at the Bank in 24<sup>th</sup> October, 2011. That he know the dispute before the Court that the plaintiffs' claims that the Title which was used as guarantee for a loan granted to V.D Enterprises (3<sup>rd</sup> defendant) was illegal. He said that, he knows 3<sup>rd</sup> defendant as a client who applied to secure a loan at ICB Bank in 2011 using a security which is land property owned by Asha Abdulrahman.

DW1, told the court the procedures which the Bank follows before issuing a loan to the client. That the Bank was able to satisfy itself of the legality of the company (3<sup>rd</sup> defendant), legal forms which includes a copy of Title which will be used a security, the visit to the location of the security (mortgaged property) and that the Bank made evaluation and search which showed that the 3<sup>rd</sup> defendant company was eligible to secure a loan.

That, after getting an approval of the loan, DW1 prepared a letter of offer for the 3<sup>rd</sup> defendant. He tendered a letter of offer from ICB to VD Enterprises Ltd dated 20/02/2012 which was admitted in Court as Exhibit D1. DW1 said that in the letter of offer, a total of TZS 660,000,000/- was advanced to the 3<sup>rd</sup> defendant and the security was a suit property with Title No. 46313 Plot No. 22 Block 5 located at Kariakoo in Dar es Salaam owned by Asha Abdrahaman.

He said that, the Bank was supplied with the original certificate of Title of the security property, he prayed to tender the same. The Court admitted

*Admitted*



the original Title as exhibit D2 but for the security purpose, only the certified copy of the said Certificate of Title was taken and remained in the Court custody. He stated that the owner of Exhibit D2 is Asha Abdrahamani. He also tendered statutory declaration of Asha Abdrahamani issued on 22/4/2012 and a mortgage of a right of occupancy between Asha Abdrahamani and ICB Bank dated 15/4/2012 which were admitted collectively in Court as exhibit D3.

DW1 also tendered a Joint Personal Guarantee dated 27/4/2012 between Mitul Shah (4<sup>th</sup> defendant), Indumat Shah (5<sup>th</sup> defendant), Asha Abdrahamani as guarantors and ICB Bank. The same was tendered and admitted in Court as Exhibit D4. He further tendered a Deed of Variation between Asha Abdrahamani and ICB Bank dated 04/12/2012 as Exhibit D5 collectively.

DW1 told the court that after the registration of the documents, the loan was disbursed to V.D Enterprises. At first, V.D Enterprises was servicing the loan properly but later they started to default by not returning the loan on time. That, the bank issued a 14 days' Notice to VD Enterprises (3<sup>rd</sup> defendant), however, the 3<sup>rd</sup> defendant failed to honour the loan and the Notice, hence, the Bank decided to attach and sale the mortgaged property. But before that, the Bank filed a Commercial Case at High Court Commercial Division which decided in favour of the Bank, that the defendants should pay the loan and interest and, in the alternative, the disposal of the securities.

*Ashs*





The copy of a Decree of the Case between International Commercial Bank Tanzania Limited and VD Enterprises Limited and 4 others was judicially noted by the court.

DW1 said further that as the Bank, they were satisfied that the one who came to the Bank was the real Asha Abdrahamani and there was no impersonation. He said that he don't know the 2<sup>nd</sup> plaintiff.

In cross examination by Mr. Kessy, DW1 stated that he was not personally responsible for the loan process but he was involved as an Institution. He admitted that the verification of guarantors was not done by him but by another Bank employee. He admitted that he has never seen Asha Abdrahamani physically, he has no identification of Asha Abdrahamani except for the picture which is on her statutory declaration.

In cross examination by Mr. Mnyele for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, DW1 stated that, if a loan is secured by 3<sup>rd</sup> party mortgage as the present case, the Title is usually brought by the owner of the Title. That, the Bank did due diligence and was satisfied by the Title owned by Asha Abdrahamani.

The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, brought only one witness in defence of their case who is Mitul Mahendra Shah (the 4<sup>th</sup> defendant, who will be referred herein as DW2).

He stated that he is one of Directors of V.D Enterprises (3<sup>rd</sup> defendant), the other Director is Mrs. Indumati Mahendra Shah (5<sup>th</sup> defendant) who

*Adls*



is his mother. He said that the 5<sup>th</sup> defendant is bed ridden and has no role in running the Company.

He admitted to have applied and secured a loan at ICB Bank and that he is a customer for the said Bank. He admitted that he knows one Asha Abdrahaman. He said that Asha was introduced to them by their friend one Mr. Mrema. That they were looking for a loan from the Bank and were also looking for collateral security. Mr. Mrema brought Asha Abdurahaman and told them that she has a security she can offer on their behalf.

DW2 stated that, he asked Ms. Asha Abdrahaman to give them a Title of her property which she produced and the same was immediately submitted to the Bank for due diligence. That the Bank approved the Title and called Asha Abdrahaman to sign mortgaged documents with photographs and identity cards. After the Bank process, the loan was disbursed to the 3<sup>rd</sup> defendant. He admitted that they have not fully paid the loan but they are in the process of paying the same.

In cross examination by Mr. Kessy, DW2 stated that the 5<sup>th</sup> defendant is a Co-Director and Co-shareholder. That she was not involved in the process of obtaining the loan from the Bank but she just signed the documents. He stated further that, he was not present at the Bank when Asha was signing the documents, but she met her during the case. That he has no idea of the where about of Asha Abdrahaman and whether she is alive or dead. That he does not know even the where about of Mr. Mrema.

*Asha*



He averred that Asha Abdrahaman gave them the Title Deed and in consideration, they promised her that they will renovate her house. That her house is located at Kariakoo and she told them that she was residing at Temeke. He admitted that he has never visited Temeke where Asha Abdrahaman used to reside. He admitted that he has never seen any identity of Asha Abdrahamani or even a photocopy of it.

On re-examination, DW2 said that they did renovate the house of Asha Abdrahaman as they have promised.

The 5<sup>th</sup> defendant was unable to testify due to health challenges. After this, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants closed their case and it marked the end of the defence case.

The parties through their advocates filed their final submissions. Mr. Emmanuel Kessy for the plaintiffs, focused his submissions on answering the issues which was agreed for determination on the first day of hearing. On the first issue on whether Asha Abdul Rahman and Asha Abdrahaman is the same person, Mr. Kessy answered in affirmative and added that, she died in 1996 as provided in Exhibit P1 which is the death certificate. He argued that the difference of the names is only on pronunciation which gives effect when it comes to writing down the said name. To cement his point, he cited the case of **Christina Mrimi vs. Coca Cola Kwanza Bottlers Limited, Civil Application No. 113 of 2021**. However, he did not supply a copy of the case to the Court as the cited case is unreported one. He maintained that the name Asha Abdul Rahman or Asha Abdrahamani is the same person who is the owner of the suit

*Alb.*





property and she has died since 1996 and the Primary Court chose Mr. Mudrick Rashid (1<sup>st</sup> plaintiff) as the administrator of her estate.

On the second issue, as to who is the lawful owner of the suit premises, Mr. Kessy submitted that, the lawful owner is Mudrik Rashid Khamis who was appointed an administrator by the Primary Court of Kariakoo in Probate No. 38 of 2009.

On the issue as to whether the mortgage of the suit property was lawful, Mr. Kessy submitted that the said mortgage was unlawful and it was obtained by fraud as at the time of the mortgaging of the said facility, the mortgagor who is Asha Abdulrahman who is also known by name Asha Abdrahaman has already passed away since 1996. That the defendants alleges that the mortgagor is alive but they failed to call her to the Court to prove the validity of the mortgage transactions. That, failure to bring Asha Abdrahaman by the defendants shows that the mortgage was entered fraudulently and the Court should draw an adverse inference against them. He referred this Court to the case of **Hemed Said vs. Mohamed Mbilu** (1984) TLR 113. He prayed for the court to grant prayers stated by the plaintiffs in their Plaint with costs as they have proved their case on the balance of probability.

The final submissions on the 1<sup>st</sup> defendant was done by Mr. Richard Madibi who after giving brief facts of the case, went on to analyse the issues by submitting on the first issue that, Asha Abdrahaman and Asha Abdul-Rahman are two distinctive persons. It is so basing on the ground that the Title Deed (Exhibit D2), certificate of death (Exhibit P1), letter of

*Alls.*



administration (Exhibit P2) and Sale Agreement (Exhibit P5) all have distinctive names. That, during the hearing, the plaintiffs failed to tender any documents over the discrepancies of the said names such as an affidavit or a Deed Poll. That without any proof over the same, the two names remain distinct and belonging to two different persons. To support his arguments, the counsel cited the cases of **Mary Lupatu vs. Magdalena Kulwa Itumbagija**, PC Civil appeal No. 42 of 2019, High Court of Tanzania Dar es Salaam (unreported) and **Saranga Wambura Nungu vs. Thomas Kisheri (Administrator of the Estate of Kisheri Nyango)** Misc. Civil Application No. 170 of 2019, HC. MZA (unreported).

On the second issue, Mr. Madibi submitted that the lawful owner of the suit property is Asha Abdrahaman whose name is appearing on the Title Deed (Exhibit D2) and not Asha Abdul Rahman as alleged by the plaintiffs, as the one who appears on the Title Deed is the owner of the suit property. He submitted further that, that being the position, i.e. Asha Abdul Rahman being not the owner of the suit, the administrator of her estate had no title to pass to the 2<sup>nd</sup> plaintiff and the contract between the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs was void ab initio. Therefore, the 2<sup>nd</sup> plaintiff is not the owner of the suit property. He cited the case of **Farah Mohamed vs. Fatuma Abdallah** (1992) TLR 205.

On the third issue, Mr. Madibi submitted that Asha Abdrahamani guaranteed the loan facility to the 3<sup>rd</sup> defendant by mortgaging her property to the 1<sup>st</sup> defendant and all the legal procedures before mortgaging the said suit property were followed.

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On the allegations of personification of the late Asha Abdul-Rahman by the 2<sup>nd</sup> defendant, Mr. Madibi said that the plaintiffs failed to tender any photograph or passport size photo of the late Asha Abdul-Rahman.

On the fourth issue, Mr. Madibi submitted that, the 2<sup>nd</sup> plaintiff has no cause of action against the defendants. That the said Asha Abdul Rahman being not the owner of the suit property, the administrator of her estate (the 1<sup>st</sup> plaintiff) had no title to pass to the 2<sup>nd</sup> plaintiff, therefore the 2<sup>nd</sup> plaintiff is not the owner of the suit property and he cannot claim any interest in the same.

On the fifth issue, Mr. Madibi submitted that the plaintiffs are not entitled to any reliefs prayed as the said Asha Abdul-Rahman is not the lawful owner of the suit property, and that the lawful owner is Asha Abdrahamani who appears on the Certificate of Title. He concluded that, that being the position, the only remedy available is to dismiss the suit with costs.

The final submissions by 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants were submitted by Mr. Mnyele, Advocate. He briefly stated that the testimony of DW2 Mitul Shah was not shaken during cross examination and he told the court that, when Asha Abdrahaman was introduced to them with her title, they sincerely believed that she was the true owner of the certificate of title and the land referred to. That both the Bank and the borrower bonafide believed that the title was genuine and the fact that the plaintiffs has said nothing blemishing to the defendants, the suit should be dismissed with costs. He stated further that since there is already a decree against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>

*Adls.*



and 5<sup>th</sup> defendants, it will be contrary to the interest of justice to condemn the defendants over and above the decree.

After hearing of the testimonies and final submissions from all parties to the suit, the court has to determine this matter basing on the issues framed during the commencement of trial.

The first issue was whether Asha Abdul Rahman and Asha Abdrahamani referred to in paragraph 7 of the Plaint and paragraph 4 of the 1<sup>st</sup> defendant's written statement of defence are one and the same person. In paragraph 7 of the Plaint, the plaintiffs claims for declaration that Plot No. 22 Block 5 Kariakoo Area, Dar es Salaam City (herein as suit property) is a property of the late ASHA ABDRAHAMANI also known as ASHA ABDUL RAHMAN under her personal legal representative.

Therefore, the plaintiffs in their Plaint and their evidence adduced before this court by oral testimonies of PW1 and PW2, and the documentary evidence produced and admitted in this court, claim that ASHA ABDRAHAMANI and ASHA ABDUL RAHMAN is one and the same person. The plaintiffs have claimed that the difference of the two names is slight due to the fact that the pronunciation for the name tend to differ by different people and it makes effect when it comes to writing down the name.

In the same breath, paragraph 4 of the 1<sup>st</sup> defendant's Written Statement of Defence, the 1<sup>st</sup> defendant alleges that the names of ASHA ABDRAHAMANI and ASHA ABDUL-RAHMAN are two different names and of the different persons. The 1<sup>st</sup> defendant has maintained that position

*Adls*





throughout her defence case and argued that, the plaintiffs failed to tender any documents over the discrepancies of the said names if at all they belong to the same person. The counsel for the 1<sup>st</sup> defendant in his final submissions stated that the 1<sup>st</sup> plaintiff was expected to have an affidavit or Deed Poll on the said discrepancies of a name, but he failed to prove so.

In his evidence, the 1<sup>st</sup> plaintiff testifying as PW1, stated that Asha Abdulrahman is his biological mother who died in 1996, and that she left a house which is the suit property. After the death of his mother he was appointed an administrator of her estate, hence he had a certificate of Title of the suit property. That the certificate of Title was lost in the custody of Ilala District Court where he has used it as a security in surety when he went to guarantee his relative who had a criminal case. That the District Court of Ilala issued him a letter to take to land offices and at the same time, he had already reported the matter to Police.

I have gone through the documents produced by the 1<sup>st</sup> plaintiff. Exhibit P1 is the death certificate of one ASHA ABDUL- RAHMAN. It shows that she died on 25/03/1996. I have noted that in this document, the name ASHA ABDUL-RAHMAN is written with a dash. The dash in the name also appears in Exhibit P2 which is a letter of appointment of the 1<sup>st</sup> plaintiff as the administrator of the estate of ASHA ABDUL-RAHMAN. This letter is dated 21/5/2009 and is the same date the 1<sup>st</sup> plaintiff was appointed as an administrator.

The evidence of PW1 shows that on 14/12/2011, the plaintiff (PW1) reported the loss of a certificate of Title No. 46313 with the name ASHA

*Asha*



ABDRAHAMANI of 4826 Dar es Salaam. I have read the Police Loss Report which was admitted as Exhibit P3. There is also a letter from Senior Resident Magistrate Incharge of Ilala District Court to Land Officer (Afisa wa Hati), Ministry for Lands, introducing the 1<sup>st</sup> plaintiff as an administrator of the estate of ASHA ABRAHAMANI with Title No. 46313 Plot No. 22 Block 5 Kariakoo. The Senior Resident Magistrate In charge is asking the Land Officer to issue another Title to the 1<sup>st</sup> plaintiff as the original one was lost in court where it was used as guarantee in surety. This letter is admitted as Exhibit P4.

The certificate of Title which was used in mortgage of the land in dispute has a name of the owner as ASHA ABDRAHAMANI. The Certificate was admitted as Exhibit D2.

From analysis of the evidence of both sides including documentary evidence, I am of the view that ASHA ABDUL RAHMAN and ASHA ABDRAHAMANI are one and the same person. I agree with the submissions of the counsel for the plaintiffs that the difference on the writing of these names is brought by the difference of pronunciation i.e. it is depends on how a person is pronouncing that name which can have effect when the name is written.

This is clearly seen even in the proceedings of the court and the final submissions by the parties.

During the framing of the issues, when writing down the first issue, the Hon. Madam Judge who is my predecessor, wrote down the names Asha **Abdul Rahman** (leaving out the dash) and Asha Abd**rah**mani instead of Abd**rah**amani as it appears in the Certificate of Title (Exhibit 2).

*A.Us.*

Looking at the 1<sup>st</sup> defendant final submissions, there is also confusion of the name whereby in some place it is typed Asha **Abrahamani**, (leaving out the "d"), Asha Abrahaman( leaving out the "d" and "i"). In some place the purported other name is written Asha **Abdul- Rahman** (with a dash), and other place it is written Asha Abdul **Rahiman** (without dash and with "i" in the middle). The spelling mistake also is seen in the plaintiffs' final submissions.

Reluctant to indulge in the literature which is not the place, I am strongly convinced that the confusion is in the last name Abdrahman or Abdrahaman and the confusion is brought by the slight error when writing that name where occasionally there is an omission of a letter which makes the name to appear different.

Furthermore, I am convinced that the Asha Abdul Rahman and Asha Abdrahman is one person through the documentary evidence which was tendered and admitted in Court. Exhibit P3 the loss Report shows that the 1<sup>st</sup> plaintiff reported the loss of a certificate on 14/12/2011. This was way back before the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants has entered a loan agreement with the 1<sup>st</sup> defendant, using the certificate of Title with a name Asha Abdrahamani as a security. The mortgaging of the suit property was done on 15/4/2012. This shows that the 1<sup>st</sup> plaintiff was indeed in the occupation of the certificate of Title with a name Asha Abdrahamani as the name with the same spelling/letters also appears in the loss Report and it appears on the court's letter (Exhibit P4).

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In his submissions, the counsel for the 1<sup>st</sup> defendant has argued that the plaintiffs have failed to prove the relationship over the said two names, and that they have also failed to tender an affidavit or Deed Poll on the discrepancies of the name.

With respect, I don't agree with the counsel's argument. The plaintiffs could not been able to produce a Deed Poll or an affidavit on the names of a person who has already passed away. I am not convinced that our laws allows for a person be it an administrator of an estate or a heir of a demised person to swear a Deed Poll or an affidavit on change of names or use of the names interchangeably on behalf of that dead person. In the circumstances where the user of the name is deceased, it could have been impossible for another person to swear an affidavit or Deed Poll to prove that those names were used by the deceased interchangeably when s/he was alive.

I find the case cited by the counsel for the 1<sup>st</sup> defendant in his final submission when he was cementing his points on the first issue to be distinguishable with the present case. This is because in the case of **Mary Lupatu vs. Magdalena Kulwa Itumbagija (supra)**, the disputed names were different, i.e. Kulwa Itumbagija Nyiga, and Joseph Kulwa Nyiga. In that case the court was right to hold that the names were different so there was a need of evidence to prove that the deceased used the two names interchangeably.

The second cases facts are also distinguishable from the present case. In the cited case of **Saranga Wambura Nungu vs. Thomas Kisheri (supra)**, the Court's finding was that annexed medical chits did not contain

*Alls*





the names of Saranga Wambura Nungu so, the medical chits could not belong to him.

In our present case, the difference of the two names is slight, based on spelling of the second name i.e. Abdul Rahman or Abdrahamani.

By this analysis, in this first issue, I find that the names Asha Abdul Rahman and Asha Abdrahamani are the same and they belong to the same person.

The second issue was who is the lawful owner of the suit property? Having found that Asha Abdul Rahman and Asha Abdrahamani is one and same person, the answer on this issue is that this same person was the lawful owner of the suit property. After her death, the ownership passed from Asha to the 1<sup>st</sup> plaintiff who was appointed an administrator of her estate. The ownership then passed through to the 2<sup>nd</sup> plaintiff who has bought the suit property as per the Sale Agreement between the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs which I find it to be a valid contract.

This is proved by the certificate of Title of the suit property exhibit D2 which shows that the suit property Plot No. 22 Block '5' Kariakoo Area, Dar es Salaam with a Number 46313 was issued to Asha Abdrahamani. The certificate was signed by the said Asha Abdrahamani on 26/8/1988, this Asha Abdrahamani who as per my finding, is also written as Asha Abdul Rahmani, Asha Abdul- Rahman, and Asha Abrahamani. Also it is proved by exhibit P2 a letter of administration of the 1<sup>st</sup> plaintiff and Exhibit P5 a Sale Agreement between the plaintiffs.

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The third issue was that, on account of the second issue, whether the 1<sup>st</sup> plaintiff guaranteed the facility claimed, to the 3<sup>rd</sup> defendant by the 1<sup>st</sup> defendant by mortgaging the suit property as security and whether the said mortgage agreement was lawful?

Looking at the third issue, it is obvious that it carries two sub issues; the first being whether the 1<sup>st</sup> plaintiff guaranteed the claimed facility to the 3<sup>rd</sup> defendant by mortgaging the suit property as security.

In answering this sub issue, I have to determine the 1<sup>st</sup> plaintiff's claims that there was a person who impersonated his late mother Asha Abdulrahmani, a person who appeared at the 1<sup>st</sup> defendant's Bank and introduced herself as Asha Abdrahamani and successfully mortgaged the suit property as a collateral to the borrowers the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.

In their final submissions, the plaintiffs claimed that, if this Asha Abdrahamani who is the mortgagor was alive, then the defendants' failure to produce her as a witness, shows that the mortgage agreement was not entered with actual Asha Abdrahamani.

In the circumstances, I am inclined to agree with the plaintiffs that, the defendants; particularly 1<sup>st</sup> and 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> defendants' failure to call this Asha Abdrahamani to contradict the evidence of the plaintiffs that Asha Abdul Rahmani is also Asha Abdrahamani and she died since 1996, cast a doubt to the defendants' evidence that Asha Abdrahamani is alive.

Therefore, as in the civil matter, the measure is on the balance of probability, I am of the view that the plaintiffs' evidence that Asha Abdul

*Alis.*



Rahmani is also Asha Abdrahamani who died in 1996 is heavier than the evidence of the defendants who claims that Asha Abdrahamani is a different person from Asha Abdul Rahmani, and that she is very much alive but has disappeared into thin air.

The 1<sup>st</sup> defendant, and the 4<sup>th</sup> defendants' evidence was that this Court has to believe that, the Bank is holding in custody the certificate of Title of a person whose whereabouts is unknown to the Bank itself. That is the Bank has no details of the mortgagor and cannot trace her whereabouts and the same Bank is about to sell the mortgaged property! The Bank is telling the Court that, it has no identity documents of the mortgagor and wants the Court to believe that.

Furthermore, the evidence of the 4<sup>th</sup> defendant as DW2 left a lot of questions. In his main evidence, DW2 said that he was introduced to Asha Abdrahaman by their friend Mr. Mrema who was a valuer for the Bank. He said that as for now, he doesn't know where Mr. Mrema is. When he was being cross examined, he said he has no idea of the whereabouts of Asha Abdrahaman. That he doesn't know the number (phone number) of Asha Abdrahaman right now. That in consideration for her guarantee, they promised Asha that they will renovate her house. But DW2 did not say whether that consideration was in writing and if it was, it was not tendered in Court.

When DW2 was asked whether they renovated the house of Asha, he agreed that they renovated the house which is located at Kariakoo.

*Ashs*



That, at the time of mortgage, Asha was residing in Temeke but he has never visited her residence. He said further that he has never seen an identification of Asha Abdrahaman or even a photocopy of it.

From this analysis, it is crystal clear that the 1<sup>st</sup> plaintiff did not guarantee the 3<sup>rd</sup> defendant to get loan from the 1<sup>st</sup> defendant by mortgaging the suit property. It is the 1<sup>st</sup> plaintiff's evidence that the Title Deed of the suit property was lost in the Court custody. He reported the matter to police in 2011 as per exhibit P3 and Exhibit P4. Meanwhile, the mortgaging process by the defendants and the said Asha Abdrahamani started in 2012. The 1<sup>st</sup> plaintiff is praying for the declaration that the whole mortgage agreement was void ab initio as the person claiming to be the owner of the facility is a fraud.

Therefore, this sub issue is answered in affirmative that the 1<sup>st</sup> plaintiff did not guarantee the said facility. I have taken note that on the second main issue, I have determined and find that the lawful owner of the suit property is the one whose name appears on the certificate of Title presented for mortgaging purposes, and since the 1<sup>st</sup> plaintiff is the administrator of the estate of Asha Abdulrahmani, then he might have in his capacity, guaranteed the 3<sup>rd</sup> defendant.

However, there is evidence from the defendants as I have already analysed that Asha Abdrahamani is alive and she personally arrived at the 1<sup>st</sup> defendant's premises in 2012 and enter an agreement with the Bank to guarantee the 3<sup>rd</sup> defendant.

*Aills*



The second sub issue arising from the third issue is whether the mortgage agreement was lawful? According to the evidence, there is a challenge to the validity of a mortgage between the 1<sup>st</sup> defendant and Asha Abdrahaman.

The 1<sup>st</sup> plaintiff who is PW1 said that the mortgage is unlawful as it was entered in 2012 between the Bank and a person who has impersonated as Asha Abdrahamani while the real Asha Abdrahamani has already died since 1996. The defendants are vehemently maintaining that Asha Abdrahamani is alive and the lawful owner of the suit property hence the mortgage was valid.

As observed earlier, the failure of the defendant to secure the attendance of their Asha Abdrahamani left a dent in their defence. While one is at liberty to defend their case, including to determine the number of witnesses, I think it was wise if not important for the claimed Asha Abdrahamani to appear and give her testimony. I firmly believe that as per sections 112 and 115 of the Evidence Act, the defendants were obliged to prove that Asha Abdrahamani is alive as the plaintiffs has established that, the said person has already died.

I have gone through the evidence of Carlos Maulid Valimba, (DW1) who said he works at the 1<sup>st</sup> defendant as a loan officer. In his evidence, he narrated the procedures which the Bank has to follow before issuing a loan. On the claims of impersonation of Asha Abdrahamani, he said that the Bank has satisfied itself that the person who came to the Bank was

*Alb.*



the real Asha Abdrahamani and not anyone else. He did not go further to explain how did the Bank satisfied itself on that issue.

In cross examination, he stated that he was not responsible personally for the loan process. He admitted that the verification of guarantors was done by one Levina Mtavangwa who is no longer an employee of the Bank. He admitted that it is the said Levina who can identify Asha, because he, DW1 has never seen Asha. He admitted that he has never seen the guarantors physically.

He said further he did not have any identification document of Asha Abdrahaman. That as a Bank, they did due diligence and was satisfied by the title owned by Asha Abdrahamani. In the re -examination, DW1 stated that, about the identity of Asha Abdrahamani, the procedure for the Bank is that the identification document is one of the items which are used in loan processing.

However, surprisingly, the defence, particularly 1<sup>st</sup> defendant's evidence, failed to produce that identification document as one of the item which was used in loan processing.

I find that the evidence of the defence leaves gaps which raise unanswered questions as such how did the Bank was satisfied that the person presenting herself as Asha Abdrahamani was indeed the one who she claims to be? There is no evidence that Asha Abdrahamani presented any identification document to prove of her citizenship, her residence, her occupation (if any), etc. Example, the Bank could have demanded a letter from the street local government (Serikali ya Mtaa) of the area of the suit property or of the area where Asha resides. In absence of any

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identification document, one could say that the Bank relied on Statutory Declaration only and the fact that she had original Title to believe that Asha Abdrahamani is the person she claims to be and hence the owner of the certificate of Title presented for security.

I am of the view that the possession of a certificate of Title is not automatic proof that one is the owner of the property in dispute. The similar position was observed in the case of **Melchiades John Mwenda vs. Gizelle Mbaga (Administratrix of the Estate of John Japhet Mbaga deceased) and 2 others**, Civil Appeal No. 57 of 2018, CAT at Dar es Salaam (unreported), where the Court of Appeal was of the view that, although the second respondent was in possession of the original certificate of Title, it was not ipso facto proof that he was the lawful owner of the disputed land.

In the present case before me, I find that the 1<sup>st</sup> defendant, the Bank did not do all of the necessary due diligence in satisfying itself of the identity of the guarantor/mortgagor Asha Abdrahamani. I am of the view in mortgaging process/ procedures, the Banks should take all necessary steps to assure themselves of the genuine of not only the documents but also the presenters of the said documents.

Basing on that analysis, I also find that the mortgage was unlawful as it was entered between the Bank and a person who fraudulently presented herself as Asha Abdrahamani while the real Asha Abdrahamani was already dead.



The next issue is whether the 2<sup>nd</sup> plaintiff has cause of action against the defendants.

This issue need not take much time. The 2<sup>nd</sup> plaintiff was involved in the present suit because as claimed by the plaintiffs, he entered into a Sale Agreement which was admitted in evidence as Exhibit P5, whereby the 1<sup>st</sup> plaintiff sold the suit property to the 2<sup>nd</sup> plaintiff. That it was through official search as per Exhibit P6 that the plaintiffs discovered that the suit property had been mortgaged.

It is my finding that the late Asha Abdul Rahmani and Asha Abdrahamani are one and same person, and that the same and her successor(s) is the lawful owner of the suit property and hence the mortgage on the suit property was invalid. I have also find that the sale agreement between the plaintiffs was valid as the 1<sup>st</sup> plaintiff sold the house in the capacity of the administrator of the late Asha Abdul Rahman or Asha Abdrahamani who was the lawful owner of the suit property. I also find that the 1<sup>st</sup> plaintiff had a title to pass to the 2<sup>nd</sup> defendant. In that circumstances, the 2<sup>nd</sup> plaintiff has cause of action against the defendants as he has interest in the suit property as purchaser of the same.

As to the last issue as to what reliefs are parties entitled to, as the framed issues are answered in affirmative and in favour of the plaintiffs, I hereby enter judgment in favour of the plaintiffs as follows;

- a) I hereby declare that Plot No. 22 Block 5 Kariakoo Area, Dar es Salaam is a property of the late ASHA ABDRAHAMANI who was also referred as ASHA ABDUL RAHMANI and ASHA ABDUL-RAHMANI and

*Allo*

- the same has never been mortgaged by the registered owner or her successor to the Title.
- b) The mortgaging of the said Plot No. 22 Block 5 Kariakoo Area Dar es Salaam (referred as suit property) was totally null and void ab initio.
  - c) The suit property Plot No. 22 Block 5 under Certificate of Title Number 46313 Kariakoo Area, Dar es Salaam is hereby discharged from the mortgage.
  - d) The first defendant is ordered to handover the Title Deed of the right of occupancy in respect of the suit property to the 1<sup>st</sup> plaintiff.
  - e) The 1<sup>st</sup> defendant is at liberty to pursue the loan debt by the 3<sup>rd</sup> defendant so as to recover the same by other lawful means not involving the suit property.
  - f) The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants shall bear the costs of the suit.

It is so ordered. Right of appeal explained to the parties.

Dated at Dar es Salaam this 27<sup>th</sup> day of January 2022



**A. MSAFIRI.**  
**JUDGE**