

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 65 OF 2022

IMARA SERVICES (T) LIMITED 1ST PLAINTIFF

**ABIAH BASASINGOHE AS A GUARDIAN
OF MUGISHA BASASINGOHE (MINOR) 2ND PLAINTIFF**

VERSUS

KCB BANK TANZANIA LIMITED DEFENDANT

JUDGMENT

30/3/2023 & 19/4/2023

A. MSAFIRI, J.

The brief facts of this case according to the Plaintiff are that on 15/12/2009 the 1st plaintiff (Imara Services (T) Limited) took a loan from the defendant (KCB Bank Tanzania Ltd) worth TZS. 140,000,000/=. The security to the loan, among others was a mortgage over a House Plot No. 170 Block F, with a Certificate of Title with L.O No. 145994, located at Mbezi Beach Area, Dar es Salaam, (herein as the suit property) and registered under the name of Abiah Basasingohe as a Guardian of Mugisha Basasingohe (Minor) (herein as the 2nd plaintiff).

The plaintiffs' claims that on 22nd day of November 2011, the defendant received a letter from Resident Magistrate Court of Dar-es-Salaam at Kisutu (herein as RMS Court Kisutu), with Ref. Civil Case No. 121/2008 requesting a handover to the Court of Certificate of Title with L.O No. 14594. That, upon receiving the said letter, the defendant submitted to RMS Court Kisutu, a

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Certificate of Title with L.O No. 145994 the property of the plaintiffs without consulting them.

The plaintiffs' claims that, the act of defendant resulted into the sale of the plaintiffs house (suit property) and hence the ownership changed to one ZAMZAM ABDALLAH. That, the defendant delivered to RMS Court Kisutu, a certificate of Title with L.O. Number which is different from the one requested by RMS Court Kisutu. Hence, the plaintiffs prays for Judgment and Decree against the defendant as follows;

- a) Declaration that the Defendant's act of handing over Certificate of Title with L.O No. 145994 to the Resident Magistrate Court of Dar es Salaam at Kisutu without consulting the plaintiffs amounted to depriving the Plaintiffs ownership to the landed property in Plot No. 170 Block F, L.O. No. 145994, Mbezi Beach area.
- b) An order that the Defendant surrender and return Certificate of Title in respect of the land in (a) above to the plaintiffs unconditionally.
Alternatively and without prejudice to "b" above,
- c) Payment by the Defendant to the Plaintiffs of TZS. 2,500,000,000/= being the current market value of the house described in 'a' above.
- d) Payment of general, punitive and exemplary damages as shall be assessed by this Honorable Court.
- e) Costs of the suit to be borne by the defendant.
- f) Any other order which this Honourable Court deems fit and just to grant in the circumstances of this suit.

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The defendant filed its defence through the written statement of defence and disputed the claims by the plaintiffs. The defendant averred that the Certificate of Title with L.O 145994 was properly handed over as ordered by the RMS Court Kisutu and that the Certificate of Title with L.O No. 14594 was a topographical error. The defendant prayed for the dismissal of the suit with costs.

At the commencement of the trial, the following issues were framed and recorded by this Court for determination;

1. Whether the plaintiff is the lawful owner of the disputed property/Title No. 145994.
2. Whether the handling of C.T. No. 145994 by the defendant to the Resident Magistrate Court of Dar es Salaam at Kisutu (RMS Court Kisutu) was proper.
3. To what reliefs are parties entitled to.

The plaintiffs were represented by Mr. Fikiri Liganga, learned advocate while the defendant had representation of Ms. Helena Ignas, with Mr. Reginald Martin, learned advocates.

To prove their cases, parties brought their witnesses whereas the plaintiffs brought one witness only namely Abiah Charles Basasingohe (who is also a 2nd plaintiff) who testified as PW1. The defendant called two witnesses; Damas Gabriel Mwangange (DW1) and Johansen Chibanda Chimonyo (DW2).

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After closing their evidence, the parties through their advocates filed the final submissions which this Court has considered while determining this case.

Starting with the first issue on **whether the plaintiff is the lawful owner of the disputed property/Title No. 145994**; there was no dispute that the 2nd plaintiff was once the lawful owner of the suit property. This fact is derived from her own testimony as PW1.

She stated that on 15th December 2009, she took a loan from the defendant, TZS. 140 Million on two securities, a personal guarantee and house mortgage (suit property). That the Title of the house had the names of Abiah Charles Basasingohe as a Guardian of Mugisha Basasingohe. She tendered a photocopy of Certificate of Title of the suit property. It was admitted in Court after the Court was satisfied that the original Certificate of Title had been under custody of the defendant and the defendant could not produce the same in Court as it was handed over to RMS Court Kisutu in Civil Case No. 21 of 2008. The photocopy of Certificate of Title on suit property was admitted as Exhibit P1.

PW1 testified that the registered owner of the suit property is Abiah Basasingohe as guardian of Mugisha Basasingohe. She averred that, as the result of the defendant's action of handing over the said Certificate of Title to RMS Court Kisutu, she lost her property as the said property was sold in public auction.

She said further that, in 2013, she conducted a search at the Ministry of Lands and found that the ownership of the suit property has been changed

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to one Zamzam Abdallah. She argued that the ownership of her property has changed because of negligence of the defendant by releasing the Certificate of Title to RMS Court Kisutu which resulted into the house in dispute being sold.

PW1 also tendered the photocopy of the letter from RMS Court Kisutu which was addressed to the defendant. The letter was admitted without objection as Exhibit P2.

I have read the contents of the letter which shows that the suit property was sold on 30th October, 2011 and Zamzam Abdallah won the public auction.

By the evidence of PW1, supported by Exhibit P1, it is clear that at the time the plaintiffs took loan at the defendant Bank and guaranteed the suit property as security, the 2nd plaintiff was the registered owner of the suit property.

However, to answer the first issue who is the lawful owner of the disputed property, the Court has to look as to who is the current owner of the suit property? Is the 2nd plaintiff still the lawful owner of the suit property?

Gathering from her own evidence in Court, the contents of the Plaint and final submissions by the plaintiffs, it has been made clear to the Court that the plaintiffs are not the owners of the suit property. PW1 have testified that the property was sold in auction and currently the owner is Zamzam Abdallah. PW1 have confirmed this by admitting in her evidence that she *Atte.*

even went for search at the Ministry for Lands and found that Zamzam Abdallah is the registered lawful owner of the suit property.

Furthermore, PW1 has tendered Exhibit P2 which is a letter from RMS Court Kisutu which shows that the suit property was sold in 2011 to Zamzam Abdallah. From this evidence, the plaintiffs have succeeded to prove to the Court that they are not the owners of the suit property, as the owner of the same is one Zamzam Abdallah.

As said earlier, the plaintiffs might have formerly been the lawful owners of the suit property, but since the same was sold in auction, the auction which is not been challenged by the plaintiffs, and since the ownership has been shifted to another person, Zamzam Abdallah, the first issue is answered in negative. The plaintiffs are not the owners of suit property with L.O No. 145994.

The second issue is whether the handing of Certificate of Title with L.O No. 145994 by the defendant to the RMS Court Kisutu was proper.

This issue is the main cause of the dispute between the parties in this suit. PW1 said that she entrusted the Certificate of Title of suit property to the defendant when she mortgaged the same for a loan. That, the defendant acting negligently, and without informing the plaintiff, released the disputed Title to RMS Court Kisutu. PW1 said further that, in 2012, she was informed by her tenants that they have been evicted from the suit property. That she went to the defendant Bank, at Legal Unit where she was informed by one

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Edward Lyimo that the defendant had received a letter from RMS Court Kisutu directing it to submit to the Court the disputed Title.

PW1 stated that at the Bank, she was shown a letter, Exhibit P2. That in Exhibit P2, the Land Office Number (L.O. No.) is 14594 while the Land Office Number (L.O) of her property (suit property) is 145994. That there is a difference between the Land Office Numbers on the two documents, Exhibits P1 and P2.

PW1 stated further that the companies which are mentioned in Exhibit P2 are Consolidated Investment Tanzania Ltd and Mugisha Enterprises. PW1 said that she has never used the named companies when she took a loan from the defendant. That, when seeking and obtaining a loan from the defendant, she used the Company of Imara Services Ltd (1st plaintiff).

PW1 testified further that when the defendant received a letter Exhibit P2 from the RMS Court Kisutu, it had a duty to inform the plaintiffs about the said letter, and that the defendant had obligation to read the contents of the letter carefully before acting upon it.

PW1 said that, this was because first, the letter Exhibit P2 does not show the number of the Certificate of Title, second, it does not state the names of the registered owners of the Certificate of Title, third, the Land Office Number of the Title in the letter Exhibit P2 is different from the Certificate of Title which was under the defendant's custody; fourth, the two companies which are named in the letter Exhibit P2, none of them were used to secure the loan. *Aille.*

PW1 stated further that, it was the duty of the defendant as a Bank to observe all these errors and wrote back to RMS Court Kisutu for more clarification.

PW1 vehemently denied the defence of the defendant raised in its written statement of defence that the letter Exhibit P2 had topographical errors, and added that if the defendant believed that, then it should have not handed the Certificate of Title to RMS Court Kisutu. PW1 submitted vehemently that the defendant, the Bank, acted in gross negligence by releasing the Certificate of Title which was entrusted to it by the plaintiffs, particularly 2nd plaintiff.

According to the evidence of the plaintiffs which includes the contents of the Plaint, the defendant was negligent in delivering to RMS Court Kisutu, a Certificate of Title with **L.O No. 145994** instead of the one with **L.O No. 14594** which was directed in Exhibit P2. According to the plaintiffs, Certificate of Title with L.O NO. 145994 is completely different from Certificate of Title with L.O No. 14594.

In her defence, the defendant called two witnesses.

DW1, said he is employed by the defendant as Head of Legal Department. He said that the 2nd plaintiff was a defendant's client whereby she requested and was extended a loan facility amounting to TZS.140 Million. That the loan was wholly paid.

DW1 stated further that in 2011, the defendant received a letter from RMS Court Kisutu which was signed by Resident Magistrate In-charge, Hon. Ilvin Mugeta (as he then was). The letter informed the defendant that there

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was a case before the said Court which concerns another Company also owned by the plaintiff. That, the letter informed further that the collateral which was under the defendant's custody have been sold by auction and the letter directed the defendant to hand over the Certificate of Title of the facility to the said Court for further actions.

DW1 said that, the Head of the Department by then went to the RMS Court Kisutu where he informed the Court that there was still outstanding amount which has not been paid by the plaintiff, which was about TZS. 45 Million.

That, later the said sum was paid to the defendant from the proceeds of the auction and the Bank released the Certificate of Title on suit property to RMS Court Kisutu.

DW1 was shown in Court Exhibits P1 and P2 and admitted that there was a difference of one number on Land Office Number, but stated that Plot No. and Block No. are the same. He insisted that, the missing one number from Exhibit P2 is a clerical error but the rest of the particulars are the same.

About the duty to inform the plaintiffs, DW1 stated that the plaintiffs knew about the whole proceedings before the RMS Court Kisutu so there was no need to inform her.

DW1, prayed for the Court to take judicial Notice of the decision of Civil Case No. 121 of 2008, Consolidated Investment vs. Mugisha Enterprises Ltd, before RMS Court Kisutu. *Actle*

DW2, also gave evidence and stated that he is a Land Officer at the Ministry for Lands and Human Settlements, with duties to advise the Commissioner for Land on all land matters.

He said that, the first thing which identifies a Title of ownership/Certificate of Title is a Title Number, second thing is Plot Number, third is Block Number, fourth is location of the property and fifth is Land Office Number (L.O. No.).

DW2 was shown and read the contents of Exhibits P1 and P2 in Court. He said that there was typing error on Exhibit P2, because the description of the Plot number in Exhibit P2 is the same as the one in Exhibit P1. He told the Court that, basing on that, there is no difference between the properties in the two documents and they are the same property. DW2 stated that the property is issued only one Title Number and that the use of L.O No. is for identification of a particular land.

In cross examination, DW2 stated that there is no possibility of two Plots to have one L.O Number. He stated further that the description is not complete on Exhibit P2 as the title number and the name of registered owner is not mentioned in the letter.

He added that he believes that the description of L.O Number in Exhibit P2 is a typing error, and that, if the letter was addressed to him, he could have taken trouble to satisfy himself on the Title Number. That he could have done so by writing back to the addressor and ask for more details on the description of the property. *Acute*

When asked for more clarification to the Court about the description of the Plot in dispute, DW2 explained that there is no Plot with two Title Numbers, and that the Title numbers are unique to every Plot. He said further that the Plot No is also unique to every block and there can never be same Plot No in one Block in a particular area.

In determining the second issue on the propriety of the handing over of Certificate of Title of the suit property to RMS Court Kisutu, the Court had to read carefully the contents of Exhibit P2.

The head of the letter read as follows;

***RE: PROPERTY L.O No. 14594 PLOT NO. 170 BLOCK "F",
KINONDONI, DAR ES SALAAM.***

The description of the suit property as per Exhibit P1 is Plot No. 170, Block F, L.O No. 145994, Mbezi, Dar es Salaam City.

The plaintiffs claims that RMS Court Kisutu requested the defendant to hand over Certificate of Title with L.O No. 14594 and not the suit property which has certificate of title with L.O No. 145994 and that these are different properties. Are these documents address the same property or different properties?

Basing on the evidence of DW2, a Land Officer who told the Court that there cannot be two landed properties with the same Plot number, then it is my view that the property described in Exhibit P1 is the same as the one described in Exhibit P2. It is Plot No. 170, Block F. There can never be two Plots No. 170, Block F at Kinondoni, Dar es Salaam City. I am convinced and agree by the evidence of DW1 and DW2 that there was an error in typing

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L.O Number whereby one number 9 was missing. Exhibit D1 shows that the property has **L.O No. 145994** while exhibit D2 shows the property with **L.O No. 14594**. Both are Plot No. 170, Block F.

The plaintiffs are basing their claim on the omission/missing of one number 9 and is using that omission to claim that the defendant erred when she handed the Certificate of Title to the said Court, which was different from the one requested.

It is my finding that the property described in Exhibit P1, the Certificate of Title is one and same to the one described in Exhibit P2 the letter from RMS Court Kisutu. The omission of one number is clear but the important description which convinced this Court that the property is the same is the description of Plot No. 170 and Block "F" supported by the evidence of Land Officer DW2 that these Plot number and Block description are unique given to one registered landed property only on a particular area. That is to say that there can never be a landed property with L.O No. 145994, Plot No.170, Block F, Kinondoni area and L.O No. 145994 also Plot No. 170, Block F also in Kinondoni area.

Hence, to answer the question raised by the plaintiffs' counsel in his final submission, this Court finds that the property with Title No. 53092, L.O No. 145994, Plot No. 170 Block F, Mbezi is the one which was referred by the RMS Court Kisutu and not any other different property as there cannot be two properties with the same Plot No. 170 and in the same Block F.

Also, having read the contents of Exhibit P2, the letter from RMS Court Kisutu did not request the defendant to hand over the Title of suit property. *Aelle*

The said letter informed the defendant that the described property was sold on 30th October 2011 by public auction and one Zamzam Abdallah won the auction. That, the orders for sale were made in Civil Case No. 121/2008 between Consolidated Investment Tanzania Ltd and Mugisha Enterprises.

The letter read as follows;

"... The purchase money has been deposited in Court and they are due for payment to the decree holder. However in the course, I have noted that you hold a registered mortgagee over that property and therefore, you hold first charge.

Now, kindly appear before this Court as commanded in the attached summons, to be heard on your mortgage..." (emphasis added).

According to Exhibit P2, the defendant was summoned by the Court to appear before it and be heard on the mortgage.

The defendant was a holder of a registered mortgage over the disputed property and the said mortgage ranked first over other subsequent mortgages on the same property.

It was not clear as to when and how the Certificate of Title on suit property was submitted to the RMS Court Kisutu but DW1 stated that, after receiving Exhibit D2, the Head of Legal Department went to the Court and informed the same that there are still outstanding debt amounting to TZS. 45 Million. That, after the sum was paid from the auction money, then the defendant released the Certificate of Title to RMS Court Kisutu.

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In the final submissions, the plaintiffs have raised several concerns one of them being that; under what basis did the defendant hand over the disputed property to third parties and whether it was justifiable?

As per Exhibit P2, the defendant was summoned to appear before the Court and be heard as the holder of first charge on the mortgage. In my view, the defendant was acting under Court order when it appeared before RMS Court, heard on the mortgage and released the Certificate of Title to the Court.

By the time the defendant was summoned and appeared before the Court by a letter dated 22/11/2011, the suit property was already sold in public auction. The circumstances leading to the sale of suit property was beyond the control of the defendant.

In her evidence in Court in cross-examination, PW1 argued that the sale of the property was not absolute because the ownership has not yet changed. That at that time, her house has not yet been sold as it was still under her name.

I find that the issue whether the suit property sale was absolute or not is not the question to be determined by this Court in the current matter. This could have been determined only if the plaintiffs were challenging the validity of the sale of suit property but they are challenging the action of defendant of handing over the Certificate of Title of suit property to the RMS Court Kisumu.

The plaintiffs have claimed in the final submissions that the defendant has contravened the provisions of Section 48 (1) of the Banking and Financial *Aelle*.

Institutions Act, 2006 which imposed the duty of confidentiality to banks and financial institutions. That the duty of confidentiality is the main duty of the Banker towards her customer affairs. The plaintiffs accuse the defendant of breaching the said duty by its act of handing over the disputed Certificate of Title.

However, the plaintiffs agrees that Section 48 (1) of the Banking and Financial Institutions Act, provides for an exception where a Bank may divulge information regarding her customer's affairs. The plaintiffs argued that, the said exception does not fit in the case at hand and that the defendant was under strict duty not to handover the plaintiff's property to third parties.

In deciding this, I have read section 48 (1) of the Banking and Financial Institutions Act, 2006 which provides as follows;

"Every bank or financial Institution shall observe except as otherwise required by the law, the practice and usages customary among bankers, and in particular, shall not divulge information relating to its customers or their affairs except in circumstances in which, in accordance with the law or practices and usages customary among the bankers, it is necessary or appropriated for the bank or financial institution to divulge such information."

The exceptions have not been laid down under the provision but has been very well explained in the case law. Among the cases of this Court whereby the exceptional circumstances were laid down is the case of *Atle*.

Yasinta Kambona vs. National Microfinance Bank (NMB – Ndanda Branch), DC Civil Appeal No. 04 of 2021 HC Mtwara Registry. This case was referred to the Court by the plaintiffs' counsel.

In the cited case, the learned Judge, Hon Dyansobera interpreted the exceptions under Section 48 of the Act. He observed that;

*"The law, however, permits the duty of confidentiality to be lifted in certain specific circumstances such as where the information related to customer's transactions is required to prevent or control unlawful activities such as money laundering, terrorism, drug trafficking or corruption **or to facilitate the conduct of legal proceedings in courts.** (Emphasis added).*

The Hon. Judge went on to describe further on the compulsion of disclosure of customers affairs by the law. He stated that in our jurisdiction, such compulsion of disclosure of information are of two major categories. One, compulsion by statutory law and two, compulsion by Court orders.

I find the above cited case to be highly persuasive and I wholly subscribe to the findings by this Court in the referred case.

In the current suit, it is my view that the circumstances fall under compulsion of disclosure by Court Order.

In their final submissions, the plaintiffs argued that there was no order of the Court calling upon the defendant to deliver the Certificate of Title of the suit property owned by the plaintiffs. *Aelle*

I have already reproduced herein the contents of Exhibit P2 which shows that the defendant was commanded by the attached summons to appear before the Court, and be heard on the registered mortgage which was under the defendant. Having being summoned to appear, the defendant was compelled to attend and be heard where it had to divulge information on the suit property.

I find that the defendant did not contravene the provisions of Section 48 of the Act as she was compelled by the Court's Order.

On the plaintiffs' right to be notified about the handover of the Certificate of Title to RMS Court Kisutu, I am satisfied by the defendant's claim that the 2nd plaintiff being the Managing Director of Mugisha Enterprises which was party in Civil Case No. 121/2008 before RMS Court Kisutu, she knew about the whole proceedings.

In cross examination, the plaintiff have admitted that she uses the Companies of Imara Services and Mugisha Enterprises in her business. The plaintiff did not deny to have knowledge of Civil Case No. 121/2008 before RMS Court Kisutu between Consolidated Investment Tanzania Ltd and Mugisha Enterprises.

Having made such analysis, the second issue on whether the handing of Certificate of Title with L.O No. 145994 by the defendant to the RMS Court Kisutu was proper is answered in affirmative.

The third issue is on the reliefs by the parties. I find that the plaintiffs did not succeed to prove their case on balance of probabilities. And for that *Acle.*

reason and basing on my findings herein above, the plaintiffs are not entitled to any claims prayed before this Court.

The defendant has prayed for dismissal of the suit with costs. I proceed to dismiss the suit in entirety, with costs.

Right of appeal explained.

Dated at Dar es Salaam this 19th day of April 2023.



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A. MSAFIRI

JUDGE

19/4/2023