

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 121 OF 2021**

MAGDALENA MAYUNGA PLAINTIFF

VERSUS

EQUITY BANK (TANZANIA) LIMITED 1ST DEFENDANT

LEO LOGISTICS COMPANY LIMITED 2ND DEFENDANT

JAYANT DHANJI BHIKA 3RD DEFENDANT

SALUM OSWARD KAMTAULE 4TH DEFENDANT

JUDGMENT

Date of last Order: 19/04/2023

Date of Judgment: 23/05/2023

A. MSAFIRI, J.

The plaintiff Magdalena Mayunga claims to be the wife of the 3rd defendant Jayant Dhanji Bhika. She said that in their matrimonial life, her (the plaintiff) and the husband (3rd defendant) acquired among other things, the land property described as Plot. No. 69, Block T, Certificate of Title (CT) No. 81385, located at Temeke Service Trade Area, Dar -es-Salaam. (herein as suit property or suit premises). She claims further that the 2nd defendant Leo logistics Company Ltd took a loan from Equity Bank (Tanzania) Ltd, the 1st defendant where by her husband, the 3rd defendant guaranteed the said loan by mortgaging the suit property which is their matrimonial property as security to the loan, without the plaintiff's consent.

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She averred that, the 2nd defendant defaulted on loan repayment which resulted into the sale of the suit property to the 4th defendant. That, the 1st, 2nd & 3rd defendants conspired and without the plaintiff's knowledge and consent, mortgaged the suit property which is a matrimonial property.

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

- a) The plaintiff's spousal consent to support 3rd defendant to guarantee the loan advanced to the 2nd defendant by charging the plaintiff's matrimonial landed property mentioned in paragraph 7 of this plaint was not obtained thus illegal.
- b) The 3rd defendant's guarantee by charging the matrimonial landed property to secure the loan was legally invalid (sic).
- c) The matrimonial landed property that was illegally charged by the 3rd defendant is not liable to be auctioned, sold, transferred or in any other way to be disposed of by the 1st defendant in order to get back the loan.
- d) This Honourable Court to nullify the sale of the matrimonial property done by the 1st defendant to the 4th defendant.
- e) Costs to be provided for.
- f) This Court be pleased to grant any other relief as it deem fit and just to grant in the interest of justice.

On their sides, the defendants vehemently denied the plaintiff's claims and put her to strict proof. Each of the defendants filed their written statements of defence (WSD).

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The 1st defendant stated that the plaintiff is a stranger to the loan contract between the 1st and 2nd defendant, and cannot be named as lawful spouse because the 2nd and 3rd defendants introduced under oath, another person namely Shilpa J. Bhikha as the only wife of the 3rd defendant. The 1st defendant claimed further that the suit premises was sold to recover part of the extended loan amount due after all the recovery measures were taken. The 1st defendant prayed for the dismissal of the suit with costs.

The 2nd and 3rd defendants also filed their joint WSD in which they were generally not disputing the plaintiff's claims. They prayed for the Court to grant any reliefs it will deem fit and just to grant.

The 4th defendant filed his WSD in which he denied the plaintiff's claims and put her to strict proof. He added that the suit property is his property which he acquired through auction as a bonafide purchaser. He prayed for the dismissal of the suit with costs.

The 4th defendant also raised a counterclaim in which he claimed to be the lawful owner of the suit property after emerging the highest bidder in the auction which was held on 28th January 2021 over the suit property. The 4th defendant prayed for the judgment and decree on the counterclaim as follows;

1. A declaration that the 4th defendant is the lawful owner of the suit property namely CT. No. 81385, Plot No. 69 Block "T" located at Temeke Municipality, Dar es Salaam, after purchasing the same upon emerging as the highest bidder for TZS 195,000,000/= in the public auction held on behalf of the 1st defendant, upon default on

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- mortgage payment over a contract of mortgage which was executed between the 2nd defendant and guaranteed by the 3rd defendant.
2. That the plaintiff, 3rd and 2nd defendants give vacant possession to the suit property.
 3. Permanent injunction be issued against the plaintiff, 2nd and 3rd defendants and their agents or workmen from interfering the quiet possession of the 4th defendant to the suit property.
 4. Payment of special damages in the tune of TZS. 110,000,000/= say one hundred and ten million Tanzanian shillings.
 5. ALTERNATIVELY, the 1st defendant be ordered to refund the purchase price in the tune of 195,000,000 to the 4th defendant with interest rate thereof at a commercial rate.
 6. General Damages.
 7. Other Orders that this Honourable Court will deem just and right to grant.

The plaintiff, 2nd and 3rd defendants, and the 1st defendant also filed their written statements of defence, denied every claim in the counterclaim and prayed for the entire dismissal of the counterclaim with costs.

By the order of the Court, the counterclaim was heard simultaneously with the main case. Before the commencement of the trial, the following issues were framed and agreed for determination which includes the ones for a counterclaim;

1. Whether there is a marriage between the plaintiff and the 3rd defendant.

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2. Whether the 2nd & 3rd defendants introduced the plaintiff as a spouse to the 1st defendant.
3. Whether there was a lawful spouse consent to the mortgage of property in dispute.
4. Whether the sale of suit property by the 1st defendant to 4th defendant was lawful.
5. To what reliefs are parties entitled to.

During the proceedings of the suit at hand, and before the commencement of the hearing, by leave of the Court, the 1st defendant filed interrogatories by way of affidavit under Order XI Cap 33 of the Civil Procedure Code, Cap 33 R.E 2019. There was exchange of interrogatories between the 1st defendant and the plaintiff and the rest of the defendants. This Court has taken into account all the information supplied from the exchange of the affidavits and counter affidavits between the said parties. The Court has taken note that the 3rd defendants practically admits nothing on his marital status. While the plaintiff maintained that her marriage to the 3rd defendant still exists and she was unaware of the mortgage transactions. The Court has also taken note that there was no dispute that the suit property is matrimonial property.

During the trial, the plaintiff was represented by Mr. Peter Nyangi, learned advocate, the 1st defendant had representation of Mr. Themistocles Rwegasira, learned advocate, the 2nd and 3rd defendants were represented by Mr. Jerry Msamanga and Ms. Biverly Lyabonga, learned advocates and the 4th defendant had legal services of Mr. Elinas Kitua, learned advocate.

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To prove their claims, the parties had their witnesses along with documentary evidence. The trial had a total of six (6) witnesses whereby the plaintiff had one witness only, the plaintiff herself, the 1st defendant had two (2) witnesses, the 2nd and 3rd defendants jointly had two (2) witnesses and the 4th defendant had only one witness, himself.

After closure of the hearing, the parties through their advocates filed their final submissions which the Court has taken into consideration in determination of the evidence.

I will analyse the evidence adduced during the trial while determining the issues.

The first issue is whether there is a marriage between the plaintiff and the 3rd defendant.

This was the claim of the plaintiff that she is a legal wife of the 3rd defendant. In her evidence as PW1, she stated that, Jayant Bhanji Bhika (3rd defendant) is her legal husband. That they were married in 15/01/2005 by a Christian marriage ceremony which was held at a Roman Catholic Church, Mbagala Zakhem, Dar es Salaam. To prove that she tendered a Certificate of Marriage which was admitted in Court as Exhibit P1. She said further that in their marriage, she and the 3rd defendant obtained a suit property which she described as Plot No. 69 Block T Mtaa wa Pazi, Temeke, Dar es Salaam. In cross examination, PW1 stated that she has four children with the 3rd defendant.

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She tendered a photocopy of the Certificate of Title (Title Deed) of the suit property which the Court admitted under Section 67(1) (c) of the Evidence Act, Cap. 6 as Exhibit P2.

It was also the evidence of the 3rd defendant Jayant Dhanji Bhika who testified as DW3, that the plaintiff is his legal wife and they were married in 11/01/2005 and are blessed with four children. That during their marriage, he and plaintiff managed to acquire the suit property and a farm at Mbagala Kibonde maji.

I have looked and read carefully Exhibit P1. It is a Marriage Certificate which shows that Jayant Bhikha and Magdalena Mayunga were married in 15/1/2005 and the wedding was officiated at a Roman Catholic Church, Mbagala, Dar es Salaam. Exhibit P1 shows that it was a monogamous marriage.

Although the Court was told by the plaintiff that she no longer live with her husband the 3rd defendant, there was no evidence that they are divorced or the marriage does not exist now or did not exist in 2016 when the 3rd defendant guarantee the loan by mortgaging the suit property which is the matrimonial property. In absence of such evidence, the Court accepted the evidence of the plaintiff which was supported by the marriage certificate exhibit P1.

Basing on the above evidence, the first issue is answered in the affirmative that there exist a lawful marriage between the plaintiff and the 3rd defendant.



The second issue is whether the 2nd and 3rd defendants introduced the plaintiff as a spouse to the 1st defendant.

The plaintiff claims that her husband, the 3rd defendant has mortgaged the suit property which is matrimonial property without her consent. She says that she was unaware of the mortgage transactions until on 25/5/2018 when she discovered that the suit premises has been used as a security to secure a loan by the 2nd defendant, guaranteed by the 3rd defendant. The loan was issued by the 1st defendant.

In determination of this issue, I have to look at the evidence adduced by the defendants. In its amended written statement of defence, the 1st defendant (Equity Bank) who issued the loan to the 2nd defendant on security of suit property guaranteed by the 3rd defendant, stated that the plaintiff is a stranger to the loan contract between the 1st and 2nd defendant. That the 1st defendant does not recognize the plaintiff because the 2nd and 3rd defendants introduced to the 1st defendant another person namely Shilpa J. Bhikha as the only wife of the 3rd defendant.

DW1 Juma Jabir Suleimani testified as a witness of the 1st defendant. He stated that he works at the 1st defendant Bank as a Loan Recovery Manager, and he has been working there since the year 2020.

He told the Court about the procedure which is followed on issuing a loan at the 1st defendant Bank. He said that, first, a borrower has to bring to the Bank an application letter requesting for a loan, second, the borrower has to have a security for a loan, and in case of immovable property, the Bank has to conduct valuation to ascertain the value of property.

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He testified that in the current dispute, the 2nd defendant was a borrower, and the security for the loan was a suit property owned by the 3rd defendant who guaranteed the 2nd defendant. DW1 tendered a Deed of Variation of Mortgage on a suit property which was between the 3rd defendant the mortgagor and Equity Bank the mortgagee. It was admitted in Court as Exhibit D1. The Deed of Variation was entered on 16/12/2016.

DW3 also tendered a document which is a Land Form No. 41 which is a declaration of a mortgage of a matrimonial home. It was admitted in Court as Exhibit D2. DW3 stated that Exhibit D2 shows that all people who have interest in the landed property has consented for the property to be used as a security for loan. That the people who consented for the suit property to be mortgaged are Jayant Dhanji Bhika, and Shilpa J. Bhika who consented as a lawful spouse of the mortgagor.

DW3 also the 3rd defendant, gave his sworn statement before the Court and testified that his company Leo Logistics (2nd defendant) was advanced/granted a loan by the 1st defendant whereby as a guarantor, he mortgaged his landed property (suit property) as a security. He admitted that he did not take and introduce his wife the plaintiff to the Bank but instead he went with Shilpa, his close friend.

DW3 said that when he went to the Bank for the purpose of loan agreement, he met with a Loan Officer who told him to bring his wife who was needed for signing a Bank document. That, he told the Loan Officer that he could not bring his wife because they have a dispute between them. So,

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the Loan Officer told him to bring another person or friend who can sign the document in place of his wife.

DW3 stated further that, he went and asked his friend Shilpa to go with him to the Bank where the loan officer gave them the documents which he and Shilpa signed.

By this evidence, it is crystal clear that the 2nd and 3rd defendants never introduced the plaintiff as a spouse to the 1st defendant, the Bank but instead the 3rd defendant introduced one SHILPA as a spouse.

This is also cemented by Exhibit D2 which is an affidavit of a mortgage of a matrimonial home, Land Form No. 41. In Exhibit D2, Jayant Dhanji Bhika stated that he is married to one wife who ordinarily resides in the said matrimonial home. In addition, at paragraph 4 of the said form one Shilpa J. Bhikha stated that she is the lawful spouse of the mortgagor and gave consent to the mortgage of their matrimonial home (the suit property). The passport photos of the said Jayant Bhikha and Shilpa J. Bhikha are affixed on the said document.

Hence, the second issue is answered that, the 2nd and 3rd defendants never introduced the plaintiff as a spouse to the 1st defendant. Instead they introduced another person one Shilpa J. Bhikha as a 3rd defendant's spouse.

The third issue is whether there was a lawful spouse consent to the mortgage of property in dispute. In determining this issue, the Court had to look at the responsibility or obligations of each party to the Deed of Variation of Mortgage which was entered between Jayant Dhanji Bhika (mortgagor) and the Equity Bank Tanzania Ltd (mortgagee) as per

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Section 114(2) of the Land Act, Cap 113 R.E 2019. Section 114(2) of the Land Act provides as follows;

*For the purpose of subsection (1), it **shall be the responsibility of a mortgagor to disclose that he has a spouse or not and upon such disclosure the mortgagee shall be under the responsibility to take reasonable steps to verify whether the applicant for a mortgage has or does not have a spouse.** (Emphasis mine).*

Here, the law shoulder a responsibility on a mortgagor to disclose that he has a spouse, and also give the responsibility to the mortgagee to take reasonable steps to verify that information.

However, Section 114 (3), of the same Act, discharge the mortgagee of that responsibility given under subsection (2), where the applicant (mortgagor) declares that there are spouse or any other third party with interest on mortgaged property. For easy of reference, I shall reproduce the wording of Section 114(3) of the said Act as follows;

114 (3): A mortgagee shall be deemed to have discharged the responsibility for ascertaining the marital status of the applicant if, by an affidavit or written and witnessed document, the applicant declares that there were spouse or any other third party holding interest in the mortgaged land.

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Back to the case at hand, there is evidence that the mortgagee (1st defendant) asked the 3rd defendant to produce a consent by his spouse confirming that the 3rd defendant's spouse has consented to the mortgaging of the suit property. The 3rd defendant complied and produced an affidavit/Form No. 41 disclosing that he has one wife who also has consented to the mortgage.

According to the 3rd defendant's oral testimony in Court, he took Shilpa to the lending Bank, introduced her as a spouse and they both filled Land Form No. 41 in which they signed before the Commissioner for Oath. The 3rd defendant declared that he is married to one wife and Shilpa J. Bhikha declared herself to be the lawful spouse of the mortgagor, the 3rd defendant and gave her consent to the mortgage of property.

In discharging the responsibility of ascertaining that the 3rd defendant is indeed married, the witness DW1, an officer from the Bank, told the Court that Bank Officers went to visit the 3rd defendant residence where they found his wife Shilpa Jayant Bhikha.

DW2 cemented further on the 1st defendant's evidence on the measures which were taken by mortgagee on inquiring about the marital status of the 3rd defendant. DW2 was employed by the 1st defendant, the Bank since 2004 so, she was there during the loan process and mortgaging of the suit property by the 2nd and 3rd defendants.

She stated that she was among the Bank Officers who went to visit the suit property so as to verify on the 3rd defendant's words/testimony that the suit property was a matrimonial property. DW2 said that, it was the

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mortgagor himself, 3rd defendant who took them to see the suit property at Temeke.

That the area was a yard and godown but there was several huts, and the mortgagor introduced his wife Shilpa and told them he lives there with her. After being satisfied the Bank releases the loan to the 2nd defendant.

The important question here is whether the 1st defendant managed to discharge its responsibility as mortgagor by conducting an efficient due diligence. Considering the circumstances of this case where the plaintiff has managed to prove to be a legal wife of the 3rd defendant, then I am of view that the Banker (Mortgagee) did not conduct enough due diligence to verify the marital status of the 3rd defendant.

It was not enough that there was a spouse consent by the purported 3rd defendant wife one Shilpa who was introduced to the Bank by the 3rd defendant as a wife. Doing proper due diligence, the Bank should have taken precaution that the applicant and mortgagor can or could have produced any woman to the Bank and claims that she is the legal wife.

If the Bank would have been efficient, then it could have demanded that Jayant Bhikah and Shilpa Bhikha produce the proof that they are husband and wife. And that proof can be brought from production of a Certificate of Marriage.

In the presence of an original Certificate of Marriage between the plaintiff and the 3rd defendant as Exhibit P1, the Court cannot rely on the existence of the Land Form No. 41 only in which the 3rd defendant agreed to mortgage the suit property and Shilpa J. Bhika consented.

Indeed, gathering from the contents of Exhibit D2 and the evidence of the 3rd defendant, it is obvious that the 3rd defendant knowingly, gave false information to the 1st defendant that Shilpa J. Bhikha is his wife and has consented to the mortgage of the suit property. Basing on that fact, the law is not silent in the circumstances where the applicant/mortgagor knowingly gives false information to the mortgagee, the measures are provided under Section 114(4) of the Land Act, but those measures are for another forum to be pursued by the mortgagee not by this Court.

Since this Court has already found in the first issue that the plaintiff is a lawful wife of the 3rd defendant who was a mortgagor, then it follows that the spouse consent should have been made and signed by her and not the other person Shilpa J. Bhika who made the existing spousal consent as per Exhibit D2.

Since there is no any other documentary evidence that Shilpa Bhikha was the lawful wife of the 3rd defendant beside Land Form No. 41 and since that form is not a Certificate of Marriage, then the spouse consent signed by Shilpa Bhikha and produced in this Court as Exhibit D2 has no legal effect. Since the spouse consent was signed by the person who was not the legal wife of the mortgagor, it is right to assert that spouse consent was not obtained as per the law.

The third issue is answered in negative that there was no lawful spouse consent to the mortgage of property in dispute.

The fourth issue is whether the sale of suit property by the 1st defendant to 4th defendant was lawful.

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The Court has already found that there was no lawful spouse consent to the mortgage of suit property. That makes the whole process of the mortgage of the suit property to be invalid. If the mortgaging of a suit property was invalid then even the sale of suit property by the 1st defendant to the 4th defendant cannot be justified.

It is apparent that spouse consent in the mortgaging of the suit property which was a matrimonial property was not legally secured. It was given by a wrong spouse which makes it illegal. The Court is satisfied that the plaintiff was not involved in the transactions and that makes the mortgaged deed pledging the suit property to be invalid. This made the whole transaction of mortgaging the suit property void ab initio because the 1st defendant had no proprietary right to the suit property and had no mandate to sell the same.

In the circumstances, I find that the sale of suit property was unlawful. The fourth issue is answered in the negative.

However, there is a counterclaim by the 4th defendant who emerged as a highest bidder at the auction where the suit property was sold.

Testifying as DW5, Salum Oswald Kamtaule, the 4th defendant, stated that he purchased the suit property in an auction which was conducted by an auctioneer Biro Star who was acting on directives of Equity Bank. That he got the information about the auction through a Newspaper and the auction took place on 28/01/2021 at Temeke where the suit property is located.

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That, he was the highest bidder at TZS 195 Million. He paid TZS 50 Million which was 25/% of the purchase price. Later, he paid the remaining 75% which was TZS. 145 Million which were all deposited at Equity Bank.

DW5 stated further that after payment, the Auctioneer Biro Star gave him a Certificate of Sale. He tendered the certificate of sale which was admitted in Court as Exhibit D.7.

That, after that, the Bank handed him all the ownership documents of the suit property including the Title Deed. He then went to the Ministry for Land and paid all necessary fees for transfer of ownership of suit property. He was told to come back after 30 days. However, before the 30 days were due, he was issued with a court summons that he was being sued in Court over the suit property. DW5 stated further that currently he is not in possession of the suit property and the previous owner still occupies it.

He prayed that if the Bank sold the suit property lawfully, then the Court orders that the suit property be handed over to him. But if the suit property was unlawfully sold, then the Bank should refund him the purchase price with interest at all times the Bank has been in possession of his money.

In cross examination by the counsel for the plaintiff, DW5 admitted that he did not produce any evidence to prove the payment of the money to the Bank.

In further cross examination by the counsel for the 1st defendant, DW5 stated that when purchasing the suit property, he believed that Equity Bank was the lawful owner of the suit property and the same has no dispute.

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He admitted that he was not given Valuation Report of the suit property so he did not know the value of the same.

The pertinent question here is whether, in the circumstances of this matter where the Court has found that the sale of suit property was unlawful, the 4th defendant is protected by the law as the bonafide purchaser.

Section 135 of the Land Act provides for protection of purchaser of a mortgaged land.

Section 135 (3) provides that;

A person to whom this section applies is protected even if at any time before the completion of the sale, has actual notice that there has not been a default by the mortgagor, that a notice has not been duly served or that the sale is in some way unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest on the part of the mortgagee of which that person has actual or constructive notice”(emphasis added).

See also the Court of Appeal cases of **Godebertha Rukanga vs. CRDB Bank Ltd & 3 others**, Civil Appeal, No. 25/17 of 2017, CAT at DSM (unreported) and **J.M. Hauliers Limited vs. Access Microfinance Bank (Tanzania) Limited**, Civil Appeal No. 274 of 2021, CAT at DSM (Unreported). In these cases, the Court of Appeal widely interpreted the

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principle of bonafide purchaser protection as provided under the provisions of the Land Act.

In the current case, the 4th defendant has managed to prove that he was the highest bidder and succeed to purchase the suit property at the public auction. That, he paid the whole purchase price to Equity Bank, the 1st defendant and this fact was not disputed by the 1st defendant who was the mortgagee and seller of the suit property.

In the circumstances, the 4th defendant might be a bonafide purchaser but is not entitled to the protection under the provisions of Section 135 of the Land Act. This is so because the evidence shows that the transfer of ownership of the suit property was not completed as the 4th defendant has not managed to transfer the property into his ownership and is not in occupation of the same.

[See the case of **Moshi Electrical Light Co. Ltd and 2 others vs. Equity Bank (T) Ltd & Others**, Land Case No. 55 of 2015 HC Registry Mwanza (unreported)] where it was held that, the protection of bonafide purchaser for value provided under Section 135 of the Land Act, accrues upon registration and the transfer of property in question to the bonafide purchaser.

Hence, the available remedy the 4th defendant has is instituting a case seeking for reliefs, which he has done in a counterclaim.

I find that in counter claim, the 4th defendant has proved on a balance of probability that he purchased the suit property. However, since the whole

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process of sale of suit by auction was void ab initio, he is entitled to the refund of the purchase price.

The 4th defendant among other reliefs, he is seeking for payment of special damages in the tune of TZS 110,000,000/=. It is the principle of law that special damages have to be proved. However throughout his evidence, the 4th defendant did not establish how he has suffered and hence entitled to the sought relief. The 4th defendant did not show how he has arrived to that figure so that the Court could assess that evidence and whether the said defendant is entitled to the award claimed.

The 5th issue is on the reliefs to the parties.

This main case is decided in favour of the plaintiff as she has proved to be the legal wife of the 3rd defendant. There were irregularities in the mortgage of the suit property where there was no lawful spouse consent from the legal wife. Hence the plaintiff is entitled to the following reliefs;

- a) It is declared that the 3rd defendant's guarantee for the loan procured by the 2nd defendant from the 1st defendant by mortgaging the suit property described as Certificate of Title (CT) No. 81385, Plot No. 69, Block "T", Temeke Service Trade Dar es Salaam is illegal for lack of lawful spouse consent.
- b) It is declared that the suit property described in paragraph (a) above being matrimonial property is not liable to be auctioned, sold, transferred or disposed in any other way by the 1st defendant without lawful spouse consent.

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- c) The sale by auction of suit property described in above which was done by the 1st defendant was void ab initio and is hereby nullified.
- d) Each party to bear their own costs.

In counterclaim, I find that the 4th defendant is entitled to the following reliefs;

1. The 1st defendant is hereby ordered to refund the purchase price in the tune of TZS 195,000,000/= to the 4th defendant with interest thereof at a current commercial rate.
2. The 1st defendant to pay general damages of TZS. 50,000,000/= to the 4th defendant.
3. Each party to bear their own costs.


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JUDGE
23/5/2023

