

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 119 OF 2021

HALIMA DAUDI PLAINTIFF

VERSUS

KILALA MUSA PEYU 1ST DEFENDANT

YUSUPH OMARY MSUMARI 2ND DEFENDANT

Date of last Order: 06/07/2023

Date of Judgment: 17/07/2023

JUDGMENT

I. ARUFANI, J

The gist of the claims of the plaintiff against the defendants is for among other things, a declaration that the loan transaction entered between the defendants and executed on 1st September, 2009 is illegal, that their matrimonial house located on Plot No. 15, Block "C" Mbezi Area within Kinondoni Municipality in Dar es Salaam Region with Certificate of Title No. 48873 (hereinafter referred as the suit property) is not liable for attachment and costs of the suit.

The allegation by the plaintiff as averred in the plaint is to the effect that, the plaintiff and the second defendant were wife and husband respectively and they contracted their marriage on 14th February, 1986.

She avers that, during subsistence of their marriage they succeeded to acquire the suit property which they were using as their matrimonial property. She stated on 20th May, 2020 she was surprised to have found a warrant of attachment from the Resident Magistrate's Court of Dar es Salaam at Kisutu (henceforth, RM'S Court) affixed on their matrimonial property requiring the second defendant to pay Tshs. 6,120,000/= within 14 days and failure of which the suit property would have been sold to realize the stated sum of money.

It is averred further by the plaintiff that the stated warrant of attachment was for execution of a decree of the RM'S Court issued against the second defendant in Civil Case No. 128 of 2012. The plaintiff alleged the defendants entered into a fraudulently loan transaction which was not disclosed to her and the second defendant clandestinely mortgaged their matrimonial property to secure the huge amount of Tshs 7,000,000/= from the first defendant. The plaintiff stated to have challenged the stated sale of their matrimonial property by filing objection proceedings at the RM'S Court without success. Thereafter she came to this court with the present suit.

The defendants filed in the court their written statement of defence whereby while the first defendant disputed the claims of the plaintiff and prayed the plaintiff's suit be dismissed with costs, the second defendant

dispute nothing in the facts averred in the plaint of the plaintiff. Before hearing of the matter, the court was informed the second defendant had passed on.

As there is nobody appeared in the court to pray to represent the deceased in the matter as his legal representative, the plaintiff's claim against the second defendant was declared it has abated pursuant to Order XXII Rule 4 (3) of the Civil Procedure Code Cap 33 R.E 2019. Thereafter the court proceeded with hearing of the matter against the first defendant. The issues framed for determination in the matter are as follows: -

1. *Whether the suit property is a matrimonial property.*
2. *Whether the suit property was pledged as a collateral for the loan advanced to the second defendant by the first defendant.*
3. *If the answer is in affirmative whether the consent of the plaintiff was obtained or there was a fraud committed by the defendant in mortgaging the suit property as a collateral for the loan.*
4. *To what reliefs are the parties entitled.*

In a bid to prove her claim the plaintiff testified as PW1 and called one witness namely Adam Yusuph Msumari who testified as PW2 and tendered three documentary exhibits. On his side the first defendant testified himself as DW1 and no exhibit was admitted in the case from his

side. PW1 told the court that, she was the wife of the second defendant and their certificate of marriage was admitted in the case as exhibit P1. She said she married the second defendant on 14th February, 1986 and in the year 1995 they constructed the suit property. She tendered to the court the certificate of title of the suit property and it was admitted in the case as exhibit P2.

She said after building their house they continued with their life until when the Court Broker namely Hilary Sande Ligate t/a Noel Estate Co. Ltd went to affix a notice of auction their house on the ground that the second defendant had failed to repay the loan advanced to him by the first defendant. The copy of the notice to settle the decretal amount in execution of the decree of the court was admitted in the case as exhibit P3. PW1 said to have become aware of the debt of the second defendant after the Court Broker when to affix the notice on their house.

She said after seeing the stated notice she found a lawyer and filed an objection proceeding at the RM's Court. She said after the objection proceeding failed to succeed, she came to this court with the present case. She prayed the court to grant the reliefs prayed in the plaint. When she was cross examined by the first defendant, she denied to have done any business with him and denied to know if the second defendant took Tshs. 7,000,000/= from her for the purpose of repairing their motor vehicle.

She said her husband has never bought any motor vehicle or own any motor vehicle.

Adam Yusuph Msumari (PW2) said the plaintiff is his mother. He said to have seen people going to their home and said they were coming from the RM'S Court. He said his mother said she don't know the said people and went to the RM'S Court to complain and she was told her complaint had been dismissed. He said all members of their family lives in the house in dispute and they don't have any other alternative house to live.

He said he had never talked to his father about the claims of the first defendant. He said he saw the first defendant at the RM'S Court while in a company of the people went to their home. When he was cross examined by the first defendant, he agreed to have worked at Airtel Company but denied to have promised to pay his debt after getting his money from Airtel Company. He said to have seen the first defendant going to their home with a white motor vehicle. He said his parents had many motor vehicles.

The first defendant who testified as DW1 told the court he started knowing the plaintiff when she was working at Wazo Hill Cement Industry as he used to do business of transportation of cement at Wazo Hill Cement

Industry area. He said there was a period the plaintiff was terminated from her employment. He said as a way of finding her means of life the plaintiff used to go at her former place of work to do business of finding customers who were in need of cement. He said after the plaintiff get the order of cement from the people they want cement, she used to apply for the cement from her fellow employees. DW1 said PW1 used him to transport the cement to her customers on payment of his costs of transportation.

He said in 2007 or 2008 when the world cup was being played at South Africa, there was a scarcity of cement at the industry as most of the cement was being transported to South Africa. He said they took cement with PW1 to various customers who were paying the money to the plaintiff. He said there was a day the plaintiff went with money of one customer to her home and when they met in the next day PW1 told him the second defendant had taken the money from her and went to Germany to follow the spare parts of their motor vehicle.

DW1 said he started making follow up of the stated money from PW1 and that caused him to know the home of PW1. He said whenever he went to follow the said money, PW1 used to tell him the second defendant had not yet come back and sometimes she used to change her story. He said there is a day PW1 told him whenever she saw him, she

was feeling upset. DW1 said there was a person told him the second defendant was an accountant at their Mosque and advised him to take his matter there for settlement. He said after taking his complaint to the Mosque, the Imam of the Mosque told the second defendant to pay his money.

He said the second defendant said he took only Tshs. 7,000,000/= from PW1. He said the second defendant said he used Tshs. 5,000,000/= to buy spare parts for his motor vehicle and he used the other money to pay school fees for his children and promised to pay the stated amount of money. DW1 said to have gone to one Salma who was working at Wazo Hill Cement Industry who PW1 was saying she was her aunt. He said Salma said she knows only Tshs. 3,750,000/= which was given to Mwajuma Shekimweri and Salma paid him Tshs. 1,250,000/=. He said Salma promised to pay the balance after being paid by Mwajuma Shekimweri but to date he has never been paid the said money.

He said when he was making follow up of the Tshs. 7,000,000/= the second defendant promised to pay him he was told by the second defendant that he would have paid him his money after his motor vehicle which was on tour returned. He said later on PW1 and the second defendant told him they were selling their motor vehicle so that they can

pay him his money and PW1 told him she would have paid him Tshs. 10,000,000/= as she had worn her case at Wazo Hill Cement Industry.

He said the plaintiff and her husband did not pay the money and caused him to borrow the money from the bank to pay the debt and that debt caused his house and his motor vehicle to be sold to repay the loan. DW1 said to have gone to his lawyer and after PW1 being called to his lawyer she promised to pay the debt but she didn't fulfil her promise. He said after seeing the plaintiff and her husband were avoiding him, he decided to take the matter to the RM'S Court where he instituted Civil Case No. 128 of 2012 against the second defendant.

He said after winning the case he filed Miscellaneous Application No. 55 of 2019 in the RM'S Court to enforce the decree for payment of his money. He said that, thereafter the second defendant went to him with the counsel for the plaintiff and prayed him to agree to settle the matter out of the court. He said the second defendant said he would have paid him Tshs. 6,120,000/= and promised to pay the same by instalment of Tshs. 1,000,000/= and the plaintiff said she would have paid him Tshs. 512,000/=.

He said after seeing the plaintiff and the second defendant have failed to pay his debt as they promised, he returned to the RM'S Court

which ordered the plaintiff's matrimonial property be sold to settle the decree of the court. He said after the matrimonial property being attached the plaintiff sued him together with the second defendant and Hillary Sunday Ligate t/a Noel Estate Company Limited who is the court broker but the case was dismissed.

He said after the plaintiff's suit being dismissed, the RM'S Court issued a notice of attachment of the matrimonial property and the notice was affixed on their matrimonial property. He said thereafter the plaintiff filed the present suit in this court against him and the second defendant. He prayed the plaintiff's suit be dismissed as the plaintiff is the one took his money and gave the same to the second defendant.

He said the money taken by the plaintiff was used in her family to pay the school fees of their children and left his children suffering and without going to school. He said his house and his motor vehicle were sold to repay the debt and caused him to return to the village where he is living a very difficult life.

When he was cross examined by the counsel for the plaintiff, he said he filed the case at the RM'S Court against the second defendant to claim for Tshs. 7,000,000/= he promised to pay him. He said he has never filed any case in court against the plaintiff. He said he didn't know the

second defendant but he came to know him through the plaintiff. He denied to have lent any money to the second defendant and said his debt arose from the business of cement he was doing with PW 1.

That is the evidence received by the court from both sides and before venturing into the issues framed for determination in this matter the court has found proper to state at this juncture that, our law and specifically section 110 of the Evidence Act, Cap 6 R.E 2019 states clearly that, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The standard of proving existence of the stated facts as provided under section 3 (2) (b) of the forgoing cited law is on preponderance of probability.

While being guided by the stated position of the law the court has found proper to start with the first issue which asks whether the suit property is a matrimonial property. The court has found the term matrimonial property has been defined in number of cases. One of them is the case of **National Bank of Commerce Limited V. Nurban Abdalla Mulla**, Civil Appeal No. 283 of 2017, CAT at DSM (unreported) where the Court of Appeal stated that: -

"Matrimonial property has a similar meaning to what is referred as a matrimonial asset and it includes a

matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage”.

The meaning of the term matrimonial property is also enunciated in the case of **Habiba Ahmad Nanguluta & 2 Others V. Hassani Ausi Mchopa** (Administrator of the Estate of the late **Hassan Nalino**), Civil Appeal No. 10 of 2022, where the Court of Appeal had this to say: -

“The position in India which we took inspiration from, is quite similar to that in our jurisdiction when it come to the interpretation of the phrase ‘Matrimonial asset’ which in our view was similar to the phrase ‘family asset’ used in Indian Act. They refer to those properties acquired by one or other spouse before or during their marriage with the intention that there should be continuing provision for them and their children during their joint lives”

From the above definition of the term matrimonial property the court has found the plaintiff avers at paragraph 5 of the plaint and stated in her oral testimony that, she married the second defendant on 14th February, 1986 and their marriage subsisted until when she filed the instant suit in the court. Her evidence that she married the second defendant on the mentioned date is supported by their marriage certificate which was admitted in the case as exhibit P1. The plaintiff avers

further at paragraph 7 of the plaint and stated in her oral evidence that during subsistence of their marriage they built the suit property and they have been using the same as is their matrimonial home.

The court has found the first defendant has not disputed in his evidence that the suit property is a matrimonial property for the plaintiff and second defendant. His assertion and evidence is to the effect that the stated house was attached in execution of the decree issued by the RMS Court in Civil Case No. 128 of 2012 which was between him and the second defendant. He stated after the suit being determined in disfavour of the second defendant is when it was ordered the suit property be attached and sold to settle his debt.

From the stated facts and evidence adduced in the matter by the parties and the definition of the term matrimonial property stated hereinabove the court has found the suit property in the case at hand is a matrimonial property as it was acquired by the plaintiff and the second defendant during subsistence of their marriage as they contracted their marriage on 14th February, 1986 and they built the suit house in 1995. In the premises the court has found the first issue is supposed to be answered in affirmative that, the suit property is a matrimonial property.

Turning to the second issue the court has found it is asking whether the suit property was pledged as a collateral for the loan advanced to the second defendant by the first defendant. The court has found the evidence adduced in this court as reproduced hereinabove shows the basis of the claims of the plaintiff against the defendant is the order of attachment of the suit property issued by the RM'S Court in execution of the decree issued in Civil Case No. 128 of 2012 of the mentioned court.

The court has come to the stated view after seeing the stated position of the matter is coming out very clear from exhibit P3 and from the evidence of the first defendant and the evidence of PW1 and PW2. The mentioned witnesses said plaintiff went to the RM'S Court to file an objection proceeding in the mentioned court after seeing the notice of attachment and sale of the suit property in execution of the decree issued in Civil Case No. 128 of 2012 by the RM'S Court had been affixed on the suit property. After the plaintiff's objection proceeding failed to succeed is when she filed the instant suit in this court.

The court has also found that, the evidence adduced in this court by the first defendant shows the basis of the case he filed in the RM'S Court against the second defendant and registered as Civil Case No. 128 of 2012 was the debt of Tshs. 7,000,000/= he was claiming from the second defendant who promised to pay to him to cover the debt the first

defendant was claiming from the plaintiff. He said the stated money arose from the business of cement which PW1 was doing and she was using him to transport the same to the stated customers.

The court has found that, although the plaintiff denied to have done any business with the first defendant and denied to owe him any debt but the court has found it is undisputed fact that the RM'S Court issued a decree in favour of the first defendant for the money the second defendant who was the plaintiff's husband promised to pay to the first defendant. The court has found it is the stated decree which caused the warrant of attaching the suit property in execution of the decree of the RM'S Court to be issued.

The court has found there is nowhere stated by any witness testified in this matter that the second defendant borrowed any money from the first defendant and pledged the suit property as a collateral for the alleged loan. To the contrary the court has found the debt which caused the second defendant to be sued by the first defendant at the RM'S Court was a debt arising from the money the second defendant promised to pay to the first defendant to clear the debt the first defendant was claiming from the plaintiff.

That being the evidence adduced in the matter, the court has found there is no way it can be said the plaintiff has managed to discharge her duty of proving there was a loan advanced to the second defendant by the first defendant and their matrimonial property was pledged as the security of the stated loan. The stated finding caused the court to come to the conclusion that the plaintiff has not managed to establish the second issue in affirmative that the suit property was pledged as a security for the loan advanced to the second defendant by the first defendant. Therefore, the second issue is answered in negative and not in affirmative.

Since the third issue was depending on the answer to the second issue to be in affirmative and the court has already found the answer to the second issue is not in affirmative then the court has found that, there is nothing which can be determined in the third issue which is asking whether the consent of the plaintiff was obtained before mortgaging their matrimonial home as the security for the loan or whether there was fraud committed in pledging the suit property as a security for the alleged loan. That is because there is no evidence to show the suit property has ever been mortgaged to secure any loan advanced to the second defendant by the first defendant.

Coming to the last issue which is in respect of the reliefs the parties are entitled the court has found that, as the plaintiff has failed to establish

there was a loan transaction executed by the first and second defendants which would have demanded her consent to be obtained, there is no way it can be said plaintiff is entitled to any relief out of the reliefs is claiming against the first defendant in the plaint. Consequently, the court has found the claims of the plaintiff against the first defendant is devoid of merit and the suit is hereby dismissed in its entirety and the costs to follow the event. It is so Ordered.

Dated at Dar es Salaam this 17th day of July, 2023.



I. Arufani
I. Arufani
JUDGE
17/07/2023

Court:

Judgment delivered today 17th day of July, 2023 in the presence of Mr. Robert Oteyo, learned counsel for the plaintiff and in the presence of the first defendant in person. Right of appeal to the Court of Appeal is fully explained.



I. Arufani
I. Arufani
JUDGE
17/07/2023