

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**LAND CASE No. 100 OF 2011**

**MARY ERASMO MANGASI.....PLAINTIFF**

**V**

**1. CRDB BANK PLC.....1<sup>st</sup> DEFENDANT**

**2. SAFI MSAFIRI MTUMBI.....2<sup>ND</sup> DEFENDANT**

**3. L.J INTERNATIONAL LTD.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Shangwa, J**

In this case, Mr. Mpoki Advocate for 1<sup>st</sup> and 3<sup>rd</sup> defendants has raised a preliminary objection against the suit on three points of law. First, that the amended plaint does not disclose a cause of action. Second, that the plaintiff has no locus standi to sue. Third, that the suit is incompetent for contravening the provisions of OVII r. 1 (f) of the Civil Procedure Code 1966 (Cop 33 R.E 2002).

On the first point of objection, Mr. Mpoki submitted that the plaint does not disclose a cause of action because the plaintiff did not state in her amended plaint what wrong was done by the 1<sup>st</sup> and 3<sup>rd</sup> defendants which are worth to be determined by this Court. In my view, the issue here is not whether or not the 1<sup>st</sup> and 3<sup>rd</sup> defendants did anything wrong to the plaintiff for determination by this Court. The issue is whether or not the mortgaging of the house on plot No. 762 Block 'A' Makongo juu which is alleged to be a matrimonial property was valid. Mr. Mwezi Mhango, Advocate submitted that the amended plaint discloses a cause of action because the plaintiff being a spouse is a co-owner of the house which is in issue in the main case and that it was contrary to law for her late husband Benedict Lubinga Kamagi to surrender its Certificate of Occupancy No. 78057 without her consent as security for a loan from the 1<sup>st</sup> defendant. The loan was of TZS 50,000,000/=. Mr. Mwezi Mhango contended that as a co-owner of the house in issue, she has a right to sue and

pray the Court to declare the mortgage as null and void. In support of his contentions, Mr. Mwezi Mhango cited S.114 (a) (b) of the Land Act. Cap 113 R.E 2002 which was wrongly typed because the correct section of the law cited is S. 112 (3) which provides as herein below:-

*“S. 112 (3) A mortgage of a matrimonial home, including a customary mortgage of a matrimonial home shall be valid only if –*

*(a) any document or form used in applying for such a mortgage is signed by or there is evidence from the document that it has been assented to by the borrower and any spouse of the borrower living in that matrimonial home,*

*(b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the borrower living in that matrimonial home”.*

Mr. Mwezi Mhango contended that the cause of action is the wrongful mortgaging of the matrimonial property without the plaintiff's consent which was not sought or obtained. Furthermore, he contended that even if there had been no cause of action disclosed, a suit cannot be objected to simply that only a declaratory order is sought. In support of his contentions, he cited S. 7 (2) of the Civil Procedure Code which provides as follows-

*“S.7 (2) no suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and a Court may make a binding declaration of right whether or not any consequential relief is or could be claimed”.*

It is not in dispute in this case that in her plaint, the plaintiff prays for a declaration that the mortgage on the property held under certificate of occupancy No. 78057 is null

and void. All the same, Mr. Mpoki contended that the plaintiff has no right to pray for nullification of the mortgage or to prevent the sale of the house in issue because the right which is provided for a spouse where the interest in the matrimonial home has been transferred by the other spouse is only the right to continue to reside in the matrimonial home until such time that the marriage is dissolved or the Court orders otherwise. In support of his contention above, he cited S.59 (2) (a) (b) of the Law of Marriage Act. Cap. 29 R.E.2002.

In my view, S. 59 (2) (a) of the Law of Marriage Act does not deny the right of a spouse to challenge the validity of the mortgage of the matrimonial home. In this case, the plaintiff has a right to challenge the validity of the mortgage of her matrimonial home. Therefore, I agree with Mr. Mwezi Mhango that the amended plaint does disclose a cause of action and that although the plaintiff is seeking for a declaratory judgment, her suit is not open to objection under the

provisions of S.7 (2) of the Civil Procedure code Cap 33 R.E 2002. This disposes of the first point of objection which fails.

On the second point of objection, Mr. Mpoki submitted that the plaintiff has no locus standi because she is neither the owner of the house in issue i.e the house at plot No. 762 Block 'A' Makongo Juu held under certificate of Title No. 78057 nor administratrix of the estate of the late Benedict Lubinga Kamagi in whose name the title of the mortgaged property is registered or guarantor of the loan advanced by 1<sup>st</sup> defendant to 2<sup>nd</sup> defendant.

On the other side, Mr. Mwezi Mhango submitted that in this case the question of being a registered owner or administratrix of the estate of the late Benedict Lubinga Kamagi or guarantor of the loan advanced by 1<sup>st</sup> defendant to 2<sup>nd</sup> defendant is out of context. He contended that Mr. Mpoki's arguments that the plaintiff has no locus standi is capricious. He said, Mr. Mpoki is aware that under S. 114 of

the Law of Marriage Act, a spouse is required to give a written consent to the mortgage and that the consent is required because a spouse is a co- owner of the property. He said, S. 59 (2) (a) (b) of the Law of Marriage Act is not applicable in this case.

In my opinion, although the right which is provided to a spouse in the matrimonial home under S. 59 (2) (a) (b) of the Law of Marriage Act is the right to continue to reside in the matrimonial home until when the marriage is dissolved or the Court orders otherwise, the said provision of law does not mean that where a spouse wants to transfer his interest in the matrimonial home such as by putting his home under mortgage, he can legally do so without a written consent of the other spouse as required by S.114 of the same Act. I agree with Mr. Mwezi Mhango that as a co- owner of the matrimonial property under mortgage, the plaintiff is entitled to protect her right to the said property. Mr. Mpoki's argument that as the title of the mortgaged property is in the

name of her late husband Benedict Lubinga Kamagi, the plaintiff has no locus standi to file the suit against the defendants is merely superficial. Therefore, despite the fact that the title of the matrimonial property under mortgage is in the name of Benedict Lubinga Kamagi (deceased) and despite the fact that the plaintiff is not administratrix of the estate of the late Benedict Lubinga Kamagi or guarantor of the loan advanced by 1<sup>st</sup> defendant to 2<sup>nd</sup> defendant, so long as she is co – owner of the matrimonial property under mortgage, she has a locus standi to sue the defendants and pray this Court to grant the relief sought. This disposes of the second point of objection which fails also.

On the third point of preliminary objection, Mr. Mpoki advanced an argument that the amended plaint offends the provisions of O.VII V. 1 (f) of the Civil Procedure Code because there is no chronology of facts showing that this Court has jurisdiction. In support of his argument, he cited two cases. One is the case of **Assanand & Sons (Uganda) Ltd**



**V. East Africa Records Ltd 1959 E.A 360 CA Uganda** where it was held thus:

*“Paragraph (f) of O.VII, V. 1 Places upon a plaintiff the obligation of pleading the facts showing that the Court has jurisdiction. That is a matter of great importance, for if the Court has no jurisdiction any judgment which is given is a nullity”.*

Another one is the case of **Mutongole V. Nyanza Textile Industries Ltd. (1991) E.A 445** in which it was held that “it is a time honoured practice for lawyers to insert in their plaint what is, in my view, a useless surplusage a statement that “this Honorable Court has jurisdiction”. Such a statement alone, does not bestow jurisdiction on any magistrate or Court. It has no magical qualities”.

Mr. Mwezi Mhango distinguished the case of Assanand with this case by submitting that whereas in the case of

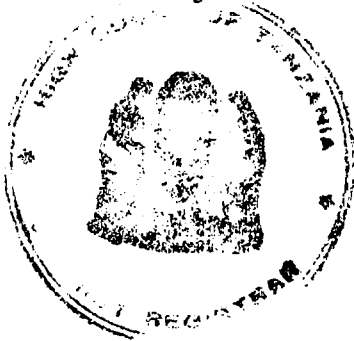
Assanand, there were two jurisdictions from which the cause of action could have arisen namely Kenya and Uganda but the plaintiff did not show any, in this case the situation is different. He distinguished the case of Mutongole with this case on some material particulars. He said that the case of Mutongole started in the Magistrates' Court from where it was dismissed on grounds that there was no averment in the plaint that the Court has jurisdiction but on appeal, the High Court allowed the appeal after holding that there is no necessity to state in the plaint that the Court has jurisdiction and after remarking that avering in the plaint that the Court has jurisdiction is a useless surplusage.

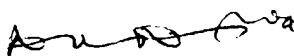
In my opinion, the amended plaint does not in reality offend the provisions of O VII V. 1 (f) of the Civil Procedure Code. Although the facts in the amended plaint showing that this Court has jurisdiction are not in a chronological order which in actual fact is not the requirement of OVII . V. 1 (f) of the Civil Procedure Code, the amended plaint does constitute

facts showing that the Court has jurisdiction. Thus, the case of Assanand and Mutongole which were cited by Mr. Mpoki are of mere academic value. As mentioned above, the amended plaint contain facts which show that this Court has jurisdiction. For instance at paragraph 6 of the amended Plaint, it is shown that in 1980, the Plaintiff and her husband built and occupied a Matrimonial home on plot 762 Block 'A' Makongo Juu held under Certificate of Occupancy No. 78057. At paragraph 10, it is shown inter-alia that Certificate of occupancy No. 78057 in respect of the matrimonial home under mortgage was given by the plaintiff's late husband to the 2<sup>nd</sup> defendant to use as security for loan from the 1<sup>st</sup> defendant. At paragraph 11, it is shown that the plaintiff did not give consent to her husband that the matrimonial property should be used as security for a loan. At paragraph 15, it is shown that she prays this Court to declare that the mortgage of the matrimonial property is null and void.

At paragraph 16, it is shown that the suit is properly filed within the jurisdiction of this Court i.e Dar es Salaam. This disposes of the third point of preliminary objection which fails as well.

In the final analysis, the preliminary points of objection are hereby over ruled. Costs to be in the main cause.



  
A. Shangwa

**JUDGE**

**12/11/2013**

Delivered in upon Court this 12<sup>th</sup> day of November, 2013 in the presence of Mr. Mwezi Mhango for the plaintiff and Miss Rose Ruta for 1<sup>st</sup> & 3<sup>rd</sup> defendant.

  
A. Shangwa

**JUDGE**

**12/11/2013**