

TANZANIA / JUDGMENT

lightness francis vs willy stanley makange 2010 tzhc 427 5 july 2010

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5 July 2010

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IN THE HIGH COURT OF TANZANIA AT PAR ES SALAAM CIVIL APPEAL NO. 225 OF 2005
(Originating from the judgment of Hon. Kabuta (SRM) of Kinondoni District Court in Civil Case No. 105 of 1999) LIGHTNESS FRANCIS.....APPELLANT VERSUS WILLY STANLEY MAKANGE..... RESPONDENT Date of last order - 27/5/2010 Date of Judgment - 5/7/2010
EXPORTE JUDGMENT Shanawa. 3. This is an appeal against the decision of the District Court of Kinondoni in Civil Case No. 105 of 1999 delivered on 16/9/2005 in which the Appellant's suit was dismissed with costs for lack of merit. The Appellant's claim before the District Court of Kinondoni in the aforesaid suit was in respect of a house at Plot No. 24 Block K. Ubungo Kisiwani in the City of Dar es Salaam. The 1st Respondent is the Appellant's former husband. The 2nd Respondent is a Bank. The 3rd Respondent is the Broker. The Appellant alleged that the aforesaid house belongs to her. She said that she built it by using money which she obtained from the defunct Tanzania Housing Bank in 1979. The Appellant further alleged that on unknown date, the 1st Respondent caused that house to be registered in his own name without her consent and without her information. In addition to that, the Appellant alleged that on unknown date, the 1st Respondent mortgaged that house to the 2nd Respondent without her information and that in September, 1999, the 3rd Respondent advertised it for sale after having been instructed by the 2nd Respondent to do so due to the 1st Respondent's failure to honour his mortgage terms. Certainly that house was sold to the highest bidder. The Appellant made the following prayers before the Ilala District Court and I quote:- "1. A declaration that mortgage agreement entered and executed between the 1st and 2nd defendants in respect of a house at Plot No 24 Block K is unlawful, null and void ab initio.

2. Unconditional release of the suit premises. 3. Perpetual injunction restraining the Defendants, their agents, work men and or servants from any how disposing of the suit premises.
4. General damages.
5. Costs of the suit.

6. Any other relief as the Court may deem fit and or just to grant." None of these prayers was granted. There are two major grounds of appeal which I find to be worthy of consideration by this Court. These two grounds of appeal are raised in the Memorandum of Appeal as grounds No. 1 and 3. Ground No. 1 reads as follows: "That the learned trial Magistrate erred in law and in fact in holding that a house at Plot No. 24 Block K Ubungo Kisiwani belongs to the first Respondent. " Ground No. 3 reads as follows:- "That the learned trial Magistrate erred in law and in fact in holding that the 1st Respondent was right on mortgaging the suit premises which is the matrimonial property to the 2nd Respondent without Consent of his spouse". As it can be seen, both grounds are interrelated. This Appeal was argued by the Appellant *ex parte* as the Respondents and or their representatives failed to appear in Court on several sittings without good cause. With regard to the 1st ground of appeal, learned counsel for the Appellant submitted that the house in issue is a matrimonial property which was acquired through joint efforts by the Appellant and the 1st Respondent during the subsistence of their marriage and that therefore the trial Magistrate ought to have found that the 1st Respondent was wrong to mortgage it without the consent of the Appellant. With regard to the second ground of appeal, counsel for the Appellant submitted that as the house in issue is matrimonial property it was wrong for the 1st Respondent to mortgage it to the 2nd Respondent without consent of the Appellant and that the trial court was wrong for not so finding. In my opinion, the trial Magistrate was right in dismissing the Appellant's suit with costs. In her judgment, the trial Magistrate stated that there was no evidence to prove that the Appellant was the owner of the house in issue and that the owner of that house is the 1st Respondent and that the 1st Respondent being the owner of that house had a right to mortgage it to the 2nd Respondent for the purpose of obtaining a loan. I entirely agree with her. It is not in dispute that during the hearing of the matter between the parties, the Appellant and the 1st Respondent were having a matrimonial cause pending at Manzese Primary Court in which the Appellant was petitioning for divorce and the division of matrimonial property including the house in issue. However, at that time, the 1st Respondent had already mortgaged the house in issue to the 2nd Respondent for the purposes of securing a loan. The first important question to be considered is whether the Appellant's allegation that the house in issue belonged to her and that the 1st Respondent registered it in his own name without her consent is correct. In my view, as there was no evidence to show that the house in issue belonged to the Appellant, her allegation that it belonged to her cannot easily be accepted. Equally speaking, her allegation that the 1st Respondent who was her former husband registered it in his own name without her consent cannot be accepted. The second important question to be considered is whether the house in issue was matrimonial property and if so whether the 1st Respondent was right in mortgaging it to the 2nd Respondent. In my view, the house in issue was matrimonial property. However, I cannot say that the 1st Respondent was wrong in mortgaging it to the 2nd Respondent simply because it was matrimonial property. This is because the 1st Respondent had to mortgage it in order to secure the bank loan which he needed badly. At the time of obtaining the loan, he had high hopes that he will repay it. Unfortunately, he was not able to repay it. Now should the Bank i.e. 2nd Respondent lose its money because the

house in issue is matrimonial property. The answer is no. It would be a very bad precedent for this Court to say yes to this question. I should say that any body who mortgages matrimonial property does it at his own risk and at the risk of his own family. In this case, the 2nd Respondent (Bank) was right to advertise the house in issue for sale upon the 1st Respondent's failure to pay its loan and interest. Therefore, the Appellant is supposed to give vacant possession of the house in issue to whomsoever it was sold. She should do so within three months from today and I so order. For the reasons I have given in this judgment, I dismiss this appeal with costs. 5/7/2010 Delivered in open court this 5th day of July, 2010 in the presence of Mr. Mujumba for the Appellant. >°"T A. Shangwa 5/7/2010

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