

TANZANIA / JUDGMENT

marima christopher vs equity bank tanzania limted and another 2021 tzhclandd 579 25 june 2021

COURT
TANZLIIDECIDED
25 June 2021

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT PAR ES
SALAAM LAND CASE NO. 441 OF 2017 MARIAM
CHRISTOPHER.....PLAINTIFF VERSUS

1. EQUITY BANK TANZANIA LIMITED
2. CHRISTOPHER MAKINDI EDWARD LIMITEDj..... DEFENDANTS

JUDGMENT

Date of Last Order: 13/04/2021 & Date of Judgment: 25/06/2021 S.M KALUNDE, J:- The brief facts leading up to this case are that, sometimes in 2015, the 2nd defendant, a husband to the plaintiff successfully applied a loan amounting to Tshs. 100,000,000.00 from the 1st defendant. The loan was to be utilized as working capital to his business and to buy off outstanding loans at Access Bank and Akiba Commercial Bank. In accordance with the facility latter, the loan was to be repaid within 30 months by equal monthly installments amounting to Tshs. 4,413,994.00. The loan was secured by a Mortgage Deed on creating a first legal charge over Plot No. 867 with Certificate of Title i No. 90591, L.0 No 390172 Block "D" located at Mbagala Area, Temeke Municipality in Dar es Salaam registered in the name of Christopher Makindi Edward (herein referred to as "the suit property"). Prior to conclusion of the facility letter, the 1st and 2nd defendant sought for, and obtained matrimonial consent from the plaintiff to allow the suit property to be used as security for the loan. Sometimes in June 2017, the 2nd defendant defaulted in making monthly instalments. Subsequent to the default, he deserted his family to an unknown place. In November, 2017 the 1st defendant moved to auction the suit property to recover the outstanding amount plus interests. Upon notification of the auction, the plaintiff brought the present suit together with Misc. Land Case Application No. 1070 of 2017 which was, however, dismissed. In the present suit the plaintiff is praying for judgment and decree against the defendants in the following terms: (i) An order declaring the plaintiff has lawful interest in the suit property; (ii) an order declaring the 1st defendant unlawful trespassed over the suit property; (iii) an order declaring that disposition of the suit property if any was null and void ab initia, (iv)

an order permanent restraining the 1st defendant, agent or third party to evict the plaintiff and her issues for the suit property; (v) an order the 1st defendant to sit with the plaintiff 2 and draw new terms on how to settle unpaid loan; and (vi) Costs. In her plaint the plaintiff pleaded that the 1st defendant sought to dispose of the suit property without issuance of a Notice of default or Notice of Intention to dispose the property to her. She also contended that the 1st defendant trespassed into her property in an attempt to auction the suit property. It was complained that, the plaintiff was not notified of the default by the 2nd defendants. Against these allegations the answering written statement of defence (WSD) of the 1st Defendant must be considered. The 1st defendant alleged that the plaintiff had no valid claim against the 1st defendant and that all her claims were vexations and baseless. Further to that the 1st defendant pledged that in 2015 the 2nd defendant a Ioan with the bank to the tune of Tshs. 100,000,000.00 in which he pledged the suit property as security. The 1st defendant stated that prior to mortgage of the suit property, they obtained a spousal consent from the plaintiff. The 1st defendant stated further that, the loan was to be repaid in 30 monthly instalment amounting to Tshs. 4,413,994. It was also pleaded that, by 16th May, 2017 the 2nd defendant failed to repay the loan and the outstanding loan amount stood at Tshs. 68,873.144.50. Thereafter a statutory 60 days' Notice of Default was issued and on its expiry a notice to auction the 3 property was issued in a newspaper. The 1st defendant insisted that the Borrower and the mortgagor was aware of his default through the respective Notices and that the 1st defendant is thus entitled to dispose of the property in exercise of his legal right under the Mortgage Deed. He concluded with a prayer that the plaintiff suit be dismissed with costs. Having failed to locate the 2nd defendant for purpose of service in this suit, on 13th February, 2018, this Court ordered the suit to proceed ex-parte against the 2nd defendant. At the final pretrial and scheduling conference, the following issues agreed and framed for determination:

- (1) Whether the 2nd defendant breached the loan agreement dated 13th April 2015;
- (2) Whether service of the 60 days' Notice of Default to the plaintiff was mandatory;
- (3) Whether the sale of the suit property was lawful; and
- (4) To what reliefs are the parties entitled to. The plaintiff did not have legal represent thus she argued her case on herself. The defendant was being represented by Ms. Kavola Semu, learned advocate. 4 At the hearing the plaintiff, Mariani Christopher, testified as PW1 and she also called one more witness, her daughter, Esther Christopher, who testified as PW2. Together with the witness testimonies, the plaintiff tendered one exhibit, a copy of the Facility Latter dated 15th April, 2015, Exhibit P.1. In her testimony in chief PW1 stated that in 2015 her husband, the 2nd defendant, applied and was granted a loan of Tshs. 100,000,000.00 by the 1st defendant. Prior to issuance of the loan she was required to sign some paper which did sign and subsequently the Facility Agreement was signed. She tendered the Facility Letter dated 15th April, 2015, Exhibit P.1 as evidence of the loan advanced. PW1 stated that around 2017 her husband closed business and disappeared to an unknown place. She stated that in September, 2017 the 1st defendant put notices of Intention to auction the house and the next day an auction was conducted, and she was issued with a seven (7) days'

Notice to vacate the house. Upon following up with the 1st defendant she was informed that her husband had defaulted in servicing the loan thus the suit property was to be auctioned to clear the outstanding amount plus interest. She then instituted the present suit to challenge the intended sale on an account that her husband had discharged part of the loan; and that she ought to have been informed prior to the sale of the suit property. She 5 objected the sale arguing that, the house be sold at an evaluated price of Tshs. 148,000,000.00. In cross examination, PW1 said she know where her husband came from but reiterated that she did not know where he is at present. She also admitted that she consented to the mortgage of the suit property and that she was aware that if her husband defaulted the house would be auctioned. The witness admitted that she signed the consent as a wife and that the house was registered in her husband's name. Further to that, the witness admitted that they defaulted in repaying the loan. She was not re-examined. PW2, stated that her father used to give her money to deposit to the bank. She claimed not to be aware of the use of the money advanced to her husband. She recalled that sometimes later the Bank claimed they owned the house. In cross-examination, she said she never deposited Tshs. 4,000,000.00 at the Bank. She was not re-examined. That summed up the plaintiff's case. The defence had one witness, one Mr. Omary Dadi Namahola, a Bank Officer from the 1st Defendant, he testified as DW1. Together with this testimony the witness tendered in evidence seven (7) exhibits. The exhibits include: the Facility Letter executed between plaintiff and 1st defendant (Exhibit D.1); certified copy of Certificate of Title No. 90591 L.O. No. 6 390172 Plot No. 867 Block D Mbagala Area Dar es salaam (Exhibit D.2); Spousal consent, Land Form No. 41 (Exhibit D.3); Mortgage Deed date 16th April, 2015 executed between 2nd defendant and 1st defendant (Exhibit D.4); the 2nd Defendant Bank Statement of the loan advanced ranging from 24th April, 2015 to 21st December, 2017 (Exhibit D.5); the 60 Days' Notice of Default, Land Form No. 54 A (Exhibit D.6) and Notice of Auction published on Daily News, dated 11th November, 2017 (Exhibit D.7) DW1 testimony in chief was that, through a facility letter, (Exh. D.1), the 2nd defendant took a loan amounting to Tshs. 100,000,000.00 for his business and to pay off loan from Access Bank and Akiba Commercial Bank. He stated that according to Exh. D.1 the loan was to be repaid in 30 monthly instalments of Tshs. 4,413,994. The witness stated that as security for the loan the 2nd defendant pledged the suit property. He added that prior to execution of the Mortgage Deed they obtained the consent from the plaintiff. To support his testimony, he tendered a certified copy of certificate of title of the suit property; Spousal consent; and a Mortgage Deed. The documents were admitted and marked as exhibits D.2, D.3 and D.4 respectively. DW1 recounted that, subsequent to the execution of Exh. D.1, D.3 and D.4, the Bank advanced Tshs. 100,000,000.00 to the 2nd Defendant. The witness presented Exh. D.5 a Bank 7 Statement from the account owned by the 2nd defendant showing the deposit of Tshs. 100,000,000.00 in the 2nd defendants account. After deposit, the 2nd defendant utilized the loan and continued to pay monthly instalments. However, instalments started to dwindle in 2016 and by May, 2017 the 2nd defendant failed to make payments. The witness testified that, upon default the 2nd defendant was issued with the statutory Notice of Default, Exh. D.6. In accordance with Exh. D.6 the outstanding principal amount plus interest totaled Tshs.

68,873,144.50 as at 16th May, 2017. It was stated that upon expiry of the 60 days, no payment had been made and there were no efforts to settle the loan. Consequently, the Bank instructed a Court Broker to commence recovery procedures. On 11th November, 2017 the Court Broker advertised the auction of the suit property through Daily News, Exh. D.7. No payments had been made Friday, 24th November 2017, the date of the auction. DW1 said, when the Bank attempted to sale the suit property they were informed of the present suit. At the time the default amount had reached Tshs. 77,752,730. In conclusion, DW1, said that, the plaintiff allegations were unfounded as all procedures for issuance of a loan were followed including obtaining spousal consent from the plaintiff. He added that the 2nd defendant utilized the loan and defaulted. Upon 8 default a Default Notice was issued where upon no payments were made. He stated that the 1st defendant complied with the requirement to advertise on a newspaper before being estopped by the present founded suit. He prayed for the suit to be dismissed with costs for lack of merits. In cross-examination by the plaintiff, DW1 said, of the Tshs. 100,000,000.00, Tshs. 60,000,000.00 was to be utilized to buy off the loan from Access Bank and Akiba Commercial Bank and Tshs. 40,000,000.00 was for the 2nd defendant's business. When questioned whether he issued Notice to the plaintiff, DW1 said the Default Notice was issued to the 2nd Defendant who took the loan and the Notice for Auction was advertised on a newspaper as required by law. In re-examination the witness stated that the suit property has not been sold. That marked the end of the defence case and the presentation of the summary of evidence presented during the trial. I will now proceed to determine the issues framed for

determination.

To start with I will, briefly, look into the law relating to mortgage and relay it to the facts of the present case in a bid to establish the relationship of the parties in the transaction leading up to this suit. In our jurisdiction, the basic principles governing the law on mortgages is provided for under Part X (Mortgages) of the Land Act, Cap. 113 R.E 2019. Under the 9 relevant part, specifically s. 113, an occupier of land under a right of occupancy is allowed to mortgage his interest in the land to secure the payment of an existing or a future or a contingent debt. Section 113 (1) reads: "113. -(1) An occupier of land under a right of occupancy and a lessee may, by an instrument in the prescribed form, with such variations and additions, if any, as the circumstances may require, mortgage his interest in the land or a part thereof to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfillment of a condition. On the basis of the above power granted onto the occupier of land the 2nd defendant applied for and was granted a loan by the 1st defendant through Exh. D.1, the Facility Letter. The plaintiff admitted that she was aware of the loan advanced to her husband. We were also informed that, the 2nd defendant sought to secure the loan by a mortgage created over the suit property. However, the law requires that, prior to mortgaging a matrimonial home the consent of the spouse or spouses must be obtained. Section 114 of Cap. 113 provides that: "114. -(1) 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 io been assented to by the mortgagor and the spouses or spouses of the mortgagor living in that matrimonial home; or
- (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 mortgagor and the spouse or spouses living in that matrimonial home." In the present case, evidence was presented that the 1st defendant, through the 2nd defendant sought and obtained the spousal consent from the plaintiff. In her testimony, the plaintiff admitted having signed some papers prior to advancement of the loan. DW1 presented in evidence Exh. D.3 Landform No. 41 representing a spousal consent signed by the plaintiff. The said spousal consent was not objected or controverted by the plaintiff. Upon signing the spousal consent, a Mortgage Deed, Exh. D.4, was executed between the 2nd defendant and the 1st defendant creating a charge over the suit property to secure a loan facility of Tshs. 100,000,000.00 advanced to the 2nd defendant. In light of the above exposition, I can safely conclude that through exhibits D.1, D.3 and D.4, a binding loan agreement backed up by the mortgage over the suit property was created between the 1st and 2nd defendant. I say so because, the same is supported by the testimony of PW1 who admitted that a loan was executed, and that she participated in the signing of Exh. ii D.3, the spousal consent. The same is also supported by DW1 testimony. That agreement is thus valid and binding on the parties thereto. Having established the validity of the loan agreement I will now proceed to respond on the issue whether the 2nd defendant breached the loan agreement dated 13th April 2015. As intimated earlier, the Loan Agreement (Exh. D.1 and P.1) was properly executed between the 1st and 2nd defendant on 13th April, 2015, among its condition precedent under Clause 6 (e) was to have duly executed security documents referred under Clause 5. In compliance with that condition the Spousal Consent (Exh. D.3) and Mortgage Deed (Exh. D.4) were executed on 16th April,
2015. Under Clause 8 of the Facility Letter, the borrower represented and warranted to the Lender that he had power and authority to execute, deliver and perform his obligation under the loan agreement; and that all the security documents were validly executed and binding upon him. Further to that, through DW1 testimony we were informed that of the Tshs. 100,000,000.00 advanced to the 2nd defendant Tshs. 60,000,000.00 was to be utilized to buy off the loan from Access Bank and Akiba Commercial Bank and Tshs. 40,000,000.00 was treated as working capital for the 2nd defendant's business. The bank statement of the accused (Exh. D.5) show that Tshs. 60,000,000.00 was deposited into the 2nd 12 defendants account on 25th April, 2015; and the remaining Tshs. 40,000,000.00 was deposited on 20th May, 2015 making the total of the agreed Tshs. 100,000,000.00. In respect thereof, it can be safely concluded that the agreed amount was disbursed or utilized by the 2nd defendant. In accordance with Clause 2 of the Facility Letter, the loan amount and interest was to be repaid in 30 monthly instalments of Tshs. 4,413,994. Under Clause 11 (a) of the Facility Letter, it was provided that, failure of the Borrower to observe and perform any of his obligations under the agreement and facility documents, may constitute an event of default where any amount outstanding under the facility may immediately become due and

payable. Upon occurrence of an event of default under Clause 11, the Lender was to issue a written Notice to the Borrower demanding repayment of the outstanding amount and interest. In his testimony, DW1 informed this Court that, upon disbursement, the 2nd defendant complied with the requirement to pay his monthly instalments. However, his monthly installments started to dwindle and by May, 2017 the 2nd defendant failed to make any monthly deposit. In her testimony in chief and cross-examination, PW1 admitted that she defaulted in repayment of the loan. That admission is a clear demonstration of the fact that the 2nd defendant failed to honor his obligation under Clauses 2, 7, 8 and 11 of the Facility Letter read together. That failure amounted to an event of default envisaged under clause 11 of the facility letter. More importantly, s. 124 (1) (a) imposes an implied covenant by the mortgagor that, he shall: "pay the principal money on the day appointed in the mortgage agreement, and, so long as the principal money or any part thereof remains unpaid, to pay interest on the money thereon or on so much of the money which for the time being remains unpaid at the rate and on the days and in the manner specified in mortgage agreement." [Emphasis mine] Having failed to make monthly instalments as agreed in the facility letter and mortgage deed, the 2nd defendant was in breach of the above implied covenant. With that exposition, I am satisfied that the 2nd defendant was in breach of his obligations under the loan agreement validly executed between him and the 1st defendant. The first issue is, thus, answered in the positive. The second issue for consideration is whether the service of the 60 days' Notice of Default to the plaintiff was mandatory. The statutory Notice of Default is governed by the provisions of

- s. 127 of Cap. 113.1 quote the section: 14 n127.-(1) Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfillment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default.
- (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters:
 - (a) ... N/A
 - (b) ... N/A
 - (c) ... N/A
 - (d) that, after the expiry of sixty days following receipt of the notice by the mortgagor, the entire amount of the claim will become due and payable and the mortgagee may exercise the right to sell the mortgaged land. "[Emphasis mine] The wording of s. 127 cited above is clear that the 60 days' Notice of Default is to be served to "the Mortgagor". In accordance with s. 112 (2) of Cap. 113 the term "mortgagor" is interpreted to mean inter alia a person who has mortgaged a right of occupancy. The section reads: "'mortgagor" means a person who has mortgaged a right of occupancy or a lease and includes a transferee of a right of occupancy or lease subject to a mortgage 15 and a person to whom such right of occupancy or lease so

subject has passed by transmission;"[Emphasis Mine] Therefore, reading the requirements of law under s. 127 read together with s. 112 (2) of Cap. 113 the statutory Notice of Default is to be served to the "mortgagor" that is the 2nd defendant. In the present case we are informed that the suit property was identified as Plot No. 867 with Certificate of Title No. 90591, L.O No 390172 Block "D" located at Mbagala Area, Temeke Municipality in Dar es Salaam registered in the name of Christopher Makindi Edward, the 2nd defendant. This is witnessed by Exh. D.2, a certificate of title in relation to the suit property where the owner of the property is identified as Christopher Makindi Edward. The same is witnessed through Exh. D.3 and D.4, in both documents the person mortgaging his property is identified as Christopher Makindi Edward, the 2nd defendant. It therefore goes without saying that, in terms of s. 127 read together with s. 112 (2) of Cap. 113, the statutory Notice of Default was to be served to Christopher Makindi Edward, the 2nd defendant and not the plaintiff. There is no requirement of law to serve the Notice of Default to the spouse, the plaintiff in the present case. The law places an obligation onto the Mortgagee to serve the Mortgagor, and not the spouse, with the default notice so that he can make good of the amount being claimed. The second issue is answered in the negative. 16 The third issue is whether the sale of the suit property was lawful or simply put whether the 1st defendant is entitled to exercise his right under the mortgage. The remedies of the mortgagee are provided for under s. 126 of Cap. 113. The section reads, I quote: "126. Where the mortgagor is in default, the mortgagee may exercise any of the following remedies -

- (a) ... N/A
 - (b) ... N/A
 - (c) ... N/A
 - (d) sell the mortgaged land, but if such mortgaged land is held under customary right of occupancy, sale shall be made to any person or group of persons referred to in section 30 of the Village Land Act." [Emphasis Mine] In accordance with section 126 cited above, upon default by the mortgagor, the mortgagee may sell the mortgaged land. Further to that, under Clause 11 of the facility letter it was agreed that, any failure by the 2nd defendant to observe or perform any its obligations under the facility amounted to an event of default which may cause any amount outstanding under the facility to become immediately due and payable. The power of sale is therefore one the rights exercisable by the 1st defendant as a mortgagee. 17 The mortgagor power of sale are expounded under s. 132 of Cap. 113 which provides that: "132.-(1) A mortgagee may, after the expiry of sixty days from the date of receipt of a notice under section 127, sell the mortgaged land.
- (2) ... N/A
 - (3) ... N/A

(4) Where a sale of mortgaged property shall be made by means other than public auction, a mortgagee shall be required to give notice of sale of not less than ten days to the mortgagor and to any third party holding a registered interest in the property."[Emphasis mine] In light of the above section, the mortgagee power of sale may be exercisable upon expiry of the sixty days from the date of receipt of a notice under section 127; and upon issuance of a notice of sale of not less than 10 days. The requirement to issue a notice of sale is also to be found under section 12 (2) of the Auctioneers Act, Cap. 227 R.E. 2002. For ease of reference section 12(2) provides that: "No sale by auction of any land shall take place until after at least fourteen days public notice thereof has been given at the principal town of the district in which the land is situated and also at the place of the intended sale. "Emphasis mine] 18 In the present case, evidence was presented that upon default the 2nd respondent was served with the notice under section 127 of Cap. 113, the notice was received and acknowledged by the 2nd respondent on 24th May, 2017. Subsequent to the service of notice and upon failure to make good of the outstanding amount plus interest claimed, the Auctioneer, Nutmeg Auctioneers & Property Managers Co. Ltd, issued a notice of auction through an advert on Daily News dated Saturday, 11th November, 2017, Exh. D.7. Up to this point the 1st defendant, as mortgagees, had complied with the legal requirements under section 132 of Cap. 113 and section 12(2) of Cap. 227. They were thus operating within the legal criterion to exercise their rights under the facility letter and mortgage deed. The third issue is, accordingly, answered in the affirmative. The 1st defendant was, and still is, entitled to exercise his right under the mortgage. As for the final issue, in relation to the relief of the parties, the plaintiff prayed for the following reliefs:

1. An order declaring the plaintiff has lawful interest in the suit property;
2. An order declaring the 1st defendant unlawful trespassed over the suit property;
3. An order declaring that disposition of the suit property if any was null and void ab initio; 19
4. An order permanent restraining the 1st defendant, agent or third party to evict the plaintiff and her issues for the suit property;
5. An order the 1st defendant to sit with the plaintiff and draw new terms on how to settle unpaid loan;
6. Costs of the suit; and
7. Any other order (s) or relief (s) as may be fit and just to grant. Having determined the 1st and 2nd issue in the affirmative; and the third issue in the negative, I must say, it goes without saying that, all the above prayers must fail. Consequently, I dismiss the plaintiff suit in its entirety. The suit is decided in favour of the 1st defendant. The plaintiff is condemned to costs. Order Accordingly. DATED at DAR ES SALAAM this 25th JUNE, 2021. ,M. KALUNDE
JUDGE 20

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/254266/source_file/marima-christopher-vs-equity-bank-tanzania-limited-and-another-2021-tzhclandd-579-25-june-2021.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/mariam-christopher-mortgageofmatrimonialhome-tanzlii-2021

Prepared on 14 October 2026 · Esheria