

TANZANIA / JUDGMENT

sifaeli msifuni vsaccess bank tanzania limited and 2 others 2020 tzhclandd 3944 11 december 2020

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND CASE NO 51
OF 2017 SIFAEI MSIFUNI..... PLAINTIFF VERSUS ACCESS BANK
TANZANIA LIMITED..... 1st DEFENDANT ELIHUDI JUMA MBWAMBO..... 2ND
DEFENDANT HUSSEIN HASSAN MAFITA..... 3rd DEFENDANT

JUDGMENT

December 3 & 11, 2020 Masara, J The Plaintiff, Sifaeli Msifuni, filed this suit contending that the mortgage of the house registered in the name of the 2nd Defendant to secure a loan facility to the 3rd Defendant from the 1st Defendant was null and void for lack of consent from her, being the lawful wife of the 2nd Defendant. The house is situated at Plot No.782 Block E, Boko Area, Kinondoni Municipality, Dar es Salaam Region (the suit property). The Plaintiff thus prays for judgment and decree against the Defendants for a declaration that the loan agreement/ mortgage Deed is null and void for lack of spouse consent; costs of the suit and any other reliefs (s) as the Court may deem just to grant. The 1st Defendant, in their written statement of defence, denied the Plaintiff's claims and prayed that the suit be dismissed with costs as the Plaintiff is not a spouse of the 2nd Defendant. Not surprisingly, the 2nd Defendant did not oppose the orders craved by the Plaintiff. The 3rd Defendant did not file their written statement of defence nor enter appearance even after substituted service was made in a newspaper. Thus, this suit proceeded to finality against the 1st and 2nd Defendants only. In Court, the Plaintiff was represented by Mr. Samwel Shadrack, learned advocate. Mr. Amadeus Mallya, learned advocate, appeared for the 1st Defendant; while the 2nd Defendant appeared in person, unrepresented. To prove her case, the Plaintiff summoned two witnesses including herself. These are Sifaeli Msifuni (PW1) and Hilder Albert Materu (PW2). One Exhibit was tendered by the Plaintiff. That was a Certificate of Marriage (exhibit P1). Mr. Francis Kimolo Mavere (DW2) testified as a sole witness for the 1st Defendant. He tendered two exhibits; namely, Mkataba wa Amana No. 0701001623-72 (exhibit D1) and Spouse Consent of one Hadija Khalifani Ramadhani dated 2nd March, 2016 (exhibit D2). Mr. Elihudi Juma Mbwambo (2nd Defendant) testified and did not call any other witness on his part. After hearing of the evidence from both sides, counsels for the Plaintiff and 1st Defendant opted to make closing submissions which will be considered in the course of

considering the evidence and issues hereunder. The following issues were drawn for determination:

- a) Whether the house on Plot 782 Block E; Boko Area, Kinondoni Municipality, Dar es Salaam, is a matrimonial home;
- b) If the answer to issue 1 is in the affirmative, whether spouse consent was sought and granted; and
- c) To what reliefs are the parties entitled to. 2 Before deliberating on the above issues, it is pertinent to provide a brief background of the suit and the evidence. There was no dispute that on 3rd February 2016 the 2nd Defendant mortgaged the suit property registered in the name of Elihudi Juma Vuriva with certificate of title No. 100791 to guarantee the 3rd Defendant to secure a loan of Tshs. 105 Million from the 1st Defendant. The mortgaged suit property was a home of the 2nd Defendant, his wife and children. It is also not in dispute that the suit property was built and registered in the names of the 2nd Defendant alone. Apparently, the 3rd Defendant defaulted the terms of the loan for failure to remit the monthly instalments. The 1st Defendant sought to exercise his right to sell the mortgaged property as per Clauses 1.3 and 1.4 of Exhibit DI. Their attempt to realise the security of the loan was frustrated when the Plaintiff, contending to be the lawful wife of the 2nd Defendant, filed this suit and a temporary injunction was ordered against the 1st Defendant on 24 May, 2017. To prove her marital status, the Plaintiff tendered exhibit Pl, a marriage Certificate No. B 0957580 dated 4th October 2003 which was proving the marriage between herself and the 2nd Defendant. The certificate refers to a marriage between Eliudi Juma and Sifael Charo Msifuni which was celebrated at Mwitén SDA Church, Kilimanjaro. The residence of the couple was recorded as Same. The 1st Defendant corroborated this evidence and stated that the two of them had been married since 1985. On his part, Mr. Mallya, in his closing submissions, challenged the authenticity of Exhibit Pl with respect to the names used by the Plaintiff in the Complaint and the name 3 appearing in the said exhibit. In his view, the two names refer to two different people and thus there is no proof that the Plaintiff is married to the 2nd Defendant. That the Plaintiff should have brought an affidavit to prove that Sifaeli Msifuni and Sifael Charo refer to one person. The Plaintiff maintained that the two refer to her. Her evidence is corroborated by PW2, her neighbour, whose evidence is that she has been living next to the Plaintiff and 2nd Defendant for over 10 years and that they live as husband and wife. This Court, in absence on any cogent evidence to the contrary, has no reasons to doubt the authenticity of Exhibit Pl. If the 1st Defendant had doubts on the authenticity of the names used or on the document as a whole, they could have sought the assistance of relevant authorities to clear or support their doubts. The Plaintiff had annexed the same document in the Complaint that she filed on 17 February, 2017 and also in Application No. 127 of 2017 filed on the same day between the same parties. In fact, the 1st Defendant conceded to the Application without filing any counter affidavit. Consequently, it is the finding of this Court that Exhibit Pl is an authentic marriage certificate proving the marriage between the Plaintiff and the 2nd Defendant. Turning back

to the first issue, the pertinent question is whether the suit property is a matrimonial property. Testifying in Court, Ms. Sifaeli Msifuni stated that she filed this suit to claim for her interest in the suit house where she, her husband and her children reside. She informed the Court that the plot and construction of the house were through joint efforts of the two, 4 notwithstanding that the property was in the name of the 2nd Defendant alone. She further stated that the said house was mortgaged by her husband (2nd Defendant) to secure a loan without her consent and that she learnt about it when officers from the 1st Defendant went to the house looking for the 2nd Defendant and was informed that the house was under a mortgage as security for a loan to the 3rd Defendant that she did not even know. Her witness, Hilder Albert Materu, confirmed that the Plaintiff, the 1st Defendant and four of their children were residing in the said property. In his closing submissions, Mr. Mallya did not address the issue whether the mortgaged property was or was not a matrimonial property. Mr. Shadrack, in his submission on the issue he reiterated the evidence from the Plaintiff adding that such evidence proved that the Plaintiff had direct contributions in the acquisition of the suit property and that it is a matrimonial home. In order to resolve the issue at hand, I need first to resolve the question of what amounts to a matrimonial property. This was well elaborated in the case of *Bi Hawa Mohamed Vs. Ally Seif* [1983] TLR 32, where the Court of Appeal made the following observations: "In our considered view, the term 'matrimonial assets' means the same thing as what is otherwise described as 'family assets'.... it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as whole." 5 In *Bank of Commerce Ltd Vs. Nurbano Abdallah Mulla*, Civil Appeal No. 283 of 2017, the Court of Appeal defined the term matrimonial property in the following terms: "On the other hand matrimonial property has similar meaning to what is referred as matrimonial asset and it includes matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage", (emphasis added). From the above cited cases, the term matrimonial asset and matrimonial property have the same meaning. Matrimonial home is also one of the matrimonial properties. In order to distinguish between what amounts to private property and what is a matrimonial property, the intention of the parties is a primary consideration; that is, whether they intend the property acquired before or during the marriage to be a joint property or not. Section 58 of the Law of Marriage Act, Cap. 29 [R.E 2019] is the operating provision as it states that marriage shall not operate to change ownership of the properties privately acquired before marriage unless there is express agreement between the parties. The case of *Mariam Tumbo Vs. Harold Tumbo* [1983] TLR 393 is very elaborative in this aspect. The Court stated: "It may be possible, however, for spouses to enter into an agreement for the joint ownership of property otherwise separately acquired. Section 58 of the Marriage Act is relevant in this regard. But in the absence of such agreement the fact of the marriage would not operate to change ownership of the property to which either the husband or the wife may be entitled." For a spouse to claim ownership over a property jointly acquired, there must be a proof that the property was acquired during the subsistence of their 6 marriage. Efforts in acquisition

of matrimonial property is subject to evidence and proof as stated in Gabriel Nimrod Kurwijiia Vs. Theresia Hassan Maiongo, Civil Appeal No. 102 of 2018 (unreported), where the Court of Appeal while quoting its previous decision in Yesse Mrisho Vs. Sania Abda, Civil Appeal No. 147 of 2016 (unreported) observed: "There is no doubt that a court, when determining such contribution must also scrutinize the contribution or efforts of each party to the marriage in acquisition of matrimonial assets." In the case at hand, the evidence that the suit property is a matrimonial home comes from the evidence of the Plaintiff, the 2nd Defendant and to some extent the evidence of PW2. This Court finds nothing on the evidence on record to disprove that the suit property is a matrimonial home. The evidence that was brought by the 1st Defendant was only meant to state that the Plaintiff was not a spouse of the 2nd Defendant and not that the suit property was not a matrimonial home. The first issue is therefore decided in the affirmative. The second issue is dependent on the answer to the 1st issue. After a careful scrutiny of the evidence from both sides, it is apparent that whether or not consent of the Plaintiff was required before the mortgage was created pivots on the ascertainment of the contents of the mortgage and the identification of the mortgaged property. Notably, the only evidence on record about the mortgage come from exhibit DI (The mortgage deed). In the mortgage deed, there is no provision set for the consent of the spouse of the mortgagor. Exhibit D2 seems to be a separate document which is concluded 7 by the spouse of the mortgagor without the endorsement of the Mortgagee or the mortgagor. The evidence available is that the suit house was mortgaged and that the Plaintiff did not consent to the disposition (mortgage). That evidence came from the Plaintiff and the 2nd Defendant. DW2, for the 1st Defendant, testified that the spouse of the 2nd Defendant, named Khadija Halifani Ramadhani, signed a Spouse Consent declaration and that the said declaration was submitted by the 2nd Defendant at the time of signing the Mortgage Deed. In his submissions, Mr. Shadrack contended that as the Plaintiff's consent was not sought as required by Section 114 of the Land Act, Cap. 114 as revised, the mortgage of the suit property was not valid. Regarding Exhibit D2, the learned counsel challenged its authenticity in that the 2nd Defendant disowned it, it does not bear the endorsement or signature of the 2nd Defendant and it refers to the 2nd Defendant as a borrower instead of a Guarantor. Mr. Mallya, on the other hand, maintained that the Bank discharged its legal diligence duty as required by Section 8 of the Mortgage Financing Act which amended Section 114 of the Land Act when it sought and obtained the Spouse Consent, exhibit D2. He also stated that failure of the Plaintiff to register a caveat on the suit property disqualifies her interests over the suit property. He cited the decision of the Court of Appeal in Hadija Issa Arerary Vs. Tanzania Postal Bank, Civil Appeal No. 135 of 2017 (unreported) to support his position. 8 Having scrutinised the evidence as a whole, it is this Court's finding that the Plaintiff did not consent to the mortgage of the suit property. This finding finds credence from evidence of both sides. Whether the 1st Defendant discharged his obligation as required to ensure that the relevant spouse consent is obtained remains questionable. It is not clear whether Exhibit D2 which is titled Spouse Consent is a standard form issued by the Bank or is a document that is merely prepared by a notary public and attested before a Commissioner for Oaths. In addition to the flaws cited by Mr. Shadrack, the document does

not bear any logo or stamp of the Bank (1st Defendant) to show that it was their document or that it was so received. Furthermore, apart from the name of the said Khadija Halifani Ramadhani, her particulars and residential details of the deponent are not indicated. The 2nd Defendant vehemently renounced knowing the Khadija or that he submitted the same at the time of signing Exhibit DI. He has a right to do so primarily because nothing on record connect him to that document. Exhibit DI does not require the mortgagor to submit that document his endorsement of the document is not in Exhibit D2. The Land Act mandates the issuer of a loan (mortgagee) to undertake due diligence to ascertain that the right consent is provided. Section 161(3) of the Land Act provides as follows:

- (3) Where a spouse who holds land or a dwelling house for a right of occupancy in his or her name alone undertakes a disposition of that land or dwelling house, then- fa) where that disposition is a mortgage, the lender shall be under a duty to make inquiries if the borrower has or, as the case may be, have consented to that mortgage accordance with the provisions of section 59 of the Law of Marriage Act; 9
- (b) where that disposition assignment or a transfer of land, the assignee or transferee shall be under a duty to make inquiries of the assignor or transferor as to whether the spouse or spouses have consented to that assignment or transfer in accordance with section 59 of the Law of Marriage Act, and where the aforesaid spouse undertaking the disposition deliberately misleads the lender or, as the case may be, the assignee or transferee as to the answers to the inquiries made in accordance with paragraphs (a) and (b), the disposition shall be voidable at the option of the spouse or spouses who have not consented to the disposition, (emphasis added) Similarly, the Law of Marriage Act, Cap. 29 provides almost similar prohibitions under Section 59. Section 59 (1) thereof states as follows: 1 'Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds. "(Emphasis added) Equally, Regulation 4 (1) of the Land (Mortgage Financing) Regulations, GN No. 355 of 2009 requires an applicant for a mortgage to declare his marital status in a prescribed form. It states: "4 (1) The applicant for a mortgage shall be required to declare his marital status as follows:
 - a) By stating in the application form whether he is married or not;
 - b) Subject to paragraph (a) where the applicant states that he is married he shall state the names and address of the spouse or the spouses as the case may be; and
 - c) Where the Applicant states that he is not married, mortgagee shall require the Applicant to declare in an affidavit or written and witnessed document that he has no spouse or any other third party holding interest on the mortgaged land." 10 In this case, there is no evidence that the above outlined procedure was complied with. From the foregoing, it is without doubts

that the Plaintiff, who was at the time of the mortgage legally married to the 2nd Defendant, did not consent to the creation of the mortgage, the beneficiary of which was the 3rd Defendant. The second issue is therefore answered in the negative. Having determined the second issue in the negative, it behoves me to determine the legality of the mortgage. This was not one of the issues crafted for determination but witnesses led evidence for and against. Furthermore, both advocates submitted on it as one of the issues for determination. While Mr. Shadrack referred to it as null and void for lack of spouse consent, Mr. Mallya thought otherwise. In his view, the fact that Exhibit D2, the spouse consent of Khadija Halifani Ramadhani, was submitted by the 2nd Defendant, the mortgage cannot be vitiated. He further argues that in the absence of a caveat from the Plaintiff, the Plaintiff has no registrable interests over the suit property. The 2nd Defendant, as already stated, denied to have been involved in the creation or submission of Exhibit D2 to the 1st Defendant. Further, he argues that the decision made by the 1st Defendant was illegal for lack of notice and for not informing him of the extent of debt that prompted the decision to sell the mortgaged property. He also stated that the suit property was one of the two securities for the loan, another one being the property of the borrower, 3rd Defendant. The 1st Defendant, through DW2, acknowledged it during cross examination that the loan was secured by two titles/houses, the other one being the house of the borrower. I have meticulously examined and considered the evidence tendered and the pleadings that are in the Court file. I could not gather any proof that there was another collateral mortgage to secure the loan. Further, there is no proof that the 2nd Defendants mortgaged property was for an amount less than the mortgaged value. Why this fact was withheld by the 1st Defendant until it was revealed during cross examination remains a paradox. The 1st Defendant, having admitted that the 2nd Defendant was just a guarantor of the borrower, they had a duty to show efforts that were made to trace borrower or realise the borrower's security. Further, considering the flaws in exhibit D2, there is no proof that the 2nd Defendant submitted the document as alleged. There is no proof that his spouse's consent was ever sought. The 2nd Defendant did not submit any document that connect the said document to the 2nd Defendant. An endorsement in the document or a marriage certificate annexed to it would have exonerated them. On the premises, the mortgage of the suit property is vitiated for lack of consent in line with Sections 161 of the Land Act and 59 of the Law of Marriage Act. The last issue is on the reliefs which the parties are entitled to. Considering what I have elucidated hereinabove, the Plaintiff has been able to establish her entitlement to the reliefs sought. Consequently, the mortgage of the suit property is hereby declared null and void for lack of spouse consent. The 1st 12 Defendant is at liberty to proceed against the borrower for the recovery of the loan. Costs of the Plaintiff to be paid by the 1st Defendant. It is so ordered. JUDGE December 11, 2020 13

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