

IN THE HIGH COURT OF TANZANIA

AT MWANZA

LAND CASE NO. 10 OF 2015

MRS. CHRISTINA ABALA MASIKU PLAINTIFF

VERSUS

1. JEREMIAH ABALA MASIKU
2. MOHAMED EQBAL ISMAIL
3. AMANA BANK LTD } **DEFENDANTS**

JUDGEMENT

Ebrahim, J.:

Mrs Christina Abala Masiku, the Plaintiff filed this case to the 2nd defendant against her husband, the 1st defendant. She is claiming that the sold he a family house located on Plot No. 72, Block M, Pasiansi in Mwanza with Certificate of Title No. 17928 without her consent. The 2nd defendant then mortgaged the disputed property to the 3rd defendant. She alleges that she became aware of all the transactions when the 3rd defendant issued notice to the 2rd defendant. She therefore prays for the order of the court that the transactions among the defendants were illegal; the disputed house was not subject of disposition without spousal consent; and defendants be ordered to pay costs.

In his Written Statement of Defence, the 1st defendant basically admitted the claim by the plaintiff. He placed blame to the 2nd defendant that he arranged the transactions without the knowledge of the plaintiff. He further denied to have transferred any interest on the disputed land to any institution and the alleged transfer claimed by the 3rd defendant was fraudulently procured.

As for the 2nd defendant he denied each and every allegation by the plaintiff and averred that the disputed property was sold to Samora M. Samora Co. Ltd with the consent of the plaintiff.

The 3rd defendant denied to have made any disposition transaction with either the 1st or 2nd defendants. He said that the mortgage transaction in respect of the disputed house was between herself and the registered owner of the said house, M/S Samora M. Samora Company Limited, a mortgagor.

At the hearing of this case, the following were the agreed issues for determination by the court:

- 1. Whether the disputed premises was sold to the second defendant without the consent of the Plaintiff*
- 2. Whether there was (any) disposition of the suit premises to the 3rd defendant by the 1st and 2nd defendant.*
- 3. Relief(s) if any parties are entitled to.*

The plaintiff in this case was represented by Mr. Makowe, learned advocate. The 1st defendant had no representation, he fended for himself. The 2nd defendant was represented by Mr. Maduhu, learned advocate and the 3rd Defendant was represented by Mr. Ibrahim Shineni, learned advocate.

In making her case, Plaintiff adduced her own and only evidence as **PW1**. Like the Plaintiff, the 1st defendant also adduced his own evidence; he did not call any additional witness. The second defendant called one witness, Mr. Mohamed Iqbal who testified as **DW3**; and the **3rd defendant** called one witness, Mr. Othman Julius who testified as **DW2**. In the course of hearing the matter, the court called as a witness, Mr. Constantine Mtalemwa (CW1) an advocate who witnessed the consent agreement deposed by the Plaintiff.

Whether the disputed premise was sold to the second defendant without the consent of the Plaintiff?

In determining this issue, the relevance is on the testimonies of PW1, DW1, DW3 and CW1.

PW1 testified under oath that she does not know Ismail Iqbar and has never consented into putting their house as collateral to Amana Bank or allowed her husband (1st defendant) to do so. She also denied knowing Samora M. Samora or that she consented the house to be sold. She denied knowing anything about Certificate of Title or her picture appended in

annexure MAI of the amended written statement of defense of the 2nd defendant. She told the court that she got the knowledge that their house was about to be sold in 2014.

DW1, the first defendant tells it all in his testimony in chief, cross examination and questions by the court. He narrated the whole history of the transaction that he entered into a business contract with Samora M. Samora (herein after referred to as "**Samora**") so that he can give him Tshs. 50,000,000/- to clear his loan with KCB. Samora M. Samora gave him the said amount, he signed for the title to be handled over to Samora and the mortgage was discharged at KCB. He narrated further that, he gave his title to Samora who then secured another loan of Tshs. 400 million with Amana Bank and promised to repay the loan amount. Samora defaulted and that was when he informed his wife, PW1.

Responding to cross examination questions he said that PW1 did not sign any document from Amana Bank and Samora and denied knowing anyone who took PW1 to advocate Mutalemwa. He admitted signing a transfer deed from KCB to his name and that was when the house was initially mortgaged to Azania Bank. He said at that stage **PW1 was involved and she signed**. As for the loan from Azania to KCB, DW1 said that he did not involve PW1 because KCB were buying the loan but he informed PW1

that Azania loan has been transferred to KCB. Hence she had knowledge. He responded also that he did not involve PW1 on transferring ownership from KCB to Samora M. Samora. When further asked about the claim that KCB handed the title un-procedurally to Samora, DW1 conceded not taking any action against Samora or KCB. However he agreed to an offer of Tshs. 350 million from Samora after securing a Tshs. 400 million loan despite the fact that his house has been illegally transferred. When cross examined further, he admitted knowing about transfer to Samora who took the title to Amana Bank; and that when the title was put as collateral for securing the loan, it was in the name of Samora M. Samora.

As it can be observed from the testimonies of DW1, while at one time he denies knowing the transfer of the title from himself to Samora, on the other side he admits accepting the offer of Tshs. 350million from Samora after he has secured a loan from Amana Bank using his title. He also admits knowing that the title was transferred to Samora.

Testifying to the contrary of what has been said by DW1, **DW2** told the court on how DW1 as an officer working with Samora M. Samora was the one who showed them the boundaries of the disputed house when they went to view the house. He testified also to have seen DW1 making banking transactions for Samora M. Samora and even when they had meetings at the

office of Samora, DW1 was invited as an officer. DW2 insisted that the Plaintiff has no cause of action with Amana Bank since their client is Samora M. Samora. **DW3** tendered in court **exhibit DE1** Transfer of a Right of Occupancy and **exhibit DE2** Consent to Dispose of the Matrimonial Property to show that his partner Samora purchased the disputed property from DW1.

Seeing exhibit DE2, the court called **CW1, Mr. Mutalemwa** an advocate who witnessed exhibit DE2. CW1 testified under oath that he knows a person named Christiana Elias Abala as the wife of the 1st defendant. He testified further that Christiana was brought to his office by her husband for signing consent to dispose of the Matrimonial Property by selling the same to Samora M. Samora. **CW1** recognised **exhibit DE1** as authentic document that he signed in witnessing DW1 transferring Landed Property in Plot No. 72, Block M with Title 17928 at Pansiasi for a consideration of Tshs. 80,000,000/-. CW1 also recognised **exhibit DE2** as a spousal consent of the wife of Jeremiah AbalaMasiku, Mrs. Christina Elias Abala. He confirmed to witness her signing spousal consent and it has her picture. He testified also that Mrs. Christina was identified to him by Mr. Abala, her husband and both signatures in DE1 and DE2 are genuine and authentic signatures as they were signed before him. Responding to cross examination questions by the 1st defendant CW1 insisted that being a legal counsel for KCB since 2006, he was called at

KCB and found DW1 and Samora conversing on how Samora could pay DW1's loans. Then DW1 consented to sale his property to Samora M. Samora and he signed the transfer of Tshs. 80million. CW1 confirmed to have witnessed Exhibit DE1 where DW1 transferred the right of occupancy to Samora M. Samora Co. Ltd and also introduced his wife to CW1 as per exhibit DE2.

Need I belabour much on this aspect, the evidence of CW1, which I have no reason to doubt together with exhibits DE1 and DE2 tells it all. Whilst PW1 tried to disown her picture, she could not refute her signature on exhibit DE2. Moreover she did not bring the previous document that DW1 said his wife signed on Azania Bank loan so that I can have an opportunity to compare the same. The same goes with exhibit DE1.

DW1 claimed that Samora fraudulently transferred his Title. However, as the law requires no proof of fraud was presented by DW1 as per the principle that I fully subscribe to illustrated in the case of **Agro Impex (Tanzania) Limited Vs. Riyaz Gulamani, Yogesh Manek & Exim Bank (T) Limited**, Civil Case No. 145 of 2008 by Hon. Juma, J (as he then was), that where the Plaintiff claims fraud or collusion by the defendants, the law imposes a duty to the Plaintiff to particularize fraud and collusion as per Order VI Rule 4 of the Civil Procedure Code, Cap 33 RE 2002. Moreover DW1 has been inconsistent

in his testimony therefore this court approaches his evidence with a pinch of salt.

Nevertheless, there is concrete documentary evidence tendered by DW3 showing that indeed the Plaintiff was aware of the whole transaction and she consented to the sale. The same was qualified by CW1 as attesting witness in terms of **Section 70 of the Evidence Act, Cap 6, RE 2002** on the proof of execution of documentary evidence; and he proved execution of the same.

Furthermore, the law of evidence is clear on the proof by documentary evidence, i.e. **Section 100(1) of the Law of Evidence Act, Cap 6, RE 2002**. The position is that where evidence is reduced into writing, no other evidence shall be given to prove the terms of such matter except the document itself. The said provision of the law reads:

"When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."

Expounding the above position of the law, Court of Appeal of Tanzania - in the case of **TANZANIA FISH PROCESSORS LTD Vs. CHRISTOPHER LUHANYULA - Civil Appeal No. 21 of 2010**, their lordships had this to say *"that when a document is reduced into writing no evidence shall be given in*

*proof of its term ... **the sub-section is premised on the fact that the document is supposed to speak by itself...**" (Emphasis is mine).*

It follows therefore that where there is documentary evidence, the content of the document shall tell it all on what was agreed upon, on what terms and what capacity.

The law i.e. **Section 59(1) of the Law of Marriage Act, Cap 29, R.E. 2002** read together with **Section 161 (3) (b) of the Land Act, Act No. 4 of 1999** protects the rights of a spouse in disposition of a matrimonial home. However, the Plaintiff in our instant case would not be protected by the cited provisions of law because as the evidence reveals she was a participant and player to the game. Exhibits DE1 and DE2 glaringly proves what transpired on the transaction between the Plaintiff, 1st defendant and Samora M. Samora Company Limited. The Plaintiff and her husband conspicuously want to mislead the court and use it as a gate keeper of their ill intention. As the saying goes, ***njiayamwongonifupi***. Thus the answer to the first issue is that actually the disputed premise was not sold to the second defendant but to Samora M. Samora Co. Ltd with the consent of the Plaintiff.

2. Whether there was (any) disposition of the suit premises to the 3^d defendant by the 1st and 2^d defendant.

3. Relief(s) if any parties are entitled to.

Need I say more that the evidence adduced by the 3rd defendant outweighs the evidence adduced by the Plaintiff and the 1st defendant. It has actually been successfully proven that there was a sale of the disputed property by the 1st defendant to Samora M. Samora Co. Ltd and the sale was consented by the Plaintiff. This means the mortgage of the disputed property by Samora M. Samora Co. Ltd to the 3rd defendant was legal and it is valid.

From the above findings, the Plaintiff has miserably failed to prove her case and I accordingly dismiss it. Considering the misleading role played by the 1st defendant, only the 2nd and 3rd defendants shall have their costs.

Accordingly ordered



Mwanza
07.12.2018

R.A. Ebrahim
Judge