

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 367 PF 2017

HARUNA SAID MBEOPLAINTIFF

VERSUS

ZAMDA RAMADHANI

MOHAMED (t/a ZARAD ENTERPRISE)1ST DEFENDANT

EXIM BANK (TANZANIA) LTD2ND DEFENDANT

KISHE AUCTION MART CO. LTD3RD DEFENDANT

JUDGMENT

20/11 & 11/12/2020

RUMANYIKA, J.

With respect to house on Plot No. 1000 Block "C" Ubungo Dar es Salaam (the house) according evidence on record mortgaged to Exim Bank (Tanzania) Limited (the 2nd defendant) by Zamda Ramadhani Mohamed (the 1st defendant), Haruna Said Mbeo (the plaintiff) prayed **one**, for a declaratory order that as the house was matrimonial, the mortgage was null and void for want of spousal consent **two**, discharge and surrender by the 2nd defendant of the respective Title No. 102227 for that purposes retained by the latter **three**, permanent injunction against the defendants

inclusive of Kishe Auction Mart Co. Ltd (the 3rd defendant) **four**, general damages and costs.

Mr. Hari Mwakalasya and Ms. Gigi Maajar learned counsel appeared for the plaintiff and 2nd defendants respectively. The 1st defendant appeared in person for some reasons appearance of the 3rd defendant having had been dispensed with. The issues for determination were; **(1)** Whether at the time of mortgage the plaintiff and 1st defendant were husband and wife **(2)** Whether there was the plaintiffs' consent **(3)** Whether there was a valid mortgage.

Pw1 Haruna Said Mbeo (62) stated that although it was solely registered in the 1st defendant's name (his wife), for quite long having had cohabited each other and they celebrated Islamic marriage in 1996, the house was matrimonial therefore he also had a share on it as they procured the house in June, 1996 but in his back the 1st defendant mortgaged it to the 2nd defendant and he could not have been aware until such time when the 3rd defendants had attached and now advertised to sale the house. That they chose not to have it, therefore no marriage certificate was issued but witnesses like the respective Sheikh were always there only that the marriage became soul in 2005. That the purported mortgage was void ab' initio for want of spousal consent much as also, upon discussion and, on such terms the 1st defendant had repaid two (2) installments only.

PW2 Shukuru Said Linjepe (49) stated that he was Imaam thereof therefore he knew the spouses (the plaintiff and 1st defendant) since 1997 among other his followers Baruti – Ubungo Mosque. That too, he was

aware of the matrimonial house belonging to the plaintiff and 1st defendant having been advertised for auction by the 2nd defendant.

Pw3 Benard Thomas Mkude (45) stated that he was between 2009-2019 inclusive of the years local leader of the plaintiff and wife for Baruti Street - Ubungo as the Executive Officer too, at times having had attended their matrimonial quarrels but not aware of the cause of the dispute between the plaintiff and the 1st defendant nor did he witness the marriage.

Dw1 Zamda Ramadhan Mohamed (55) stated that having had asked some in 2013, and the 2nd defendant granted her loan for some business, she fell so sick that the business went bad and she defaulted. That indeed after a long cohabitation they contracted Islamic marriage in 1996 and the house therefore it was matrimonial but due to some matrimonial disputes she mortgaged it to the 2nd defendant and surrendered the CT without the plaintiff's spousal but on that one she presented to the 2nd defendant an untruthful and adverse affidavit but she could not have known its legal consequences. That having had asked for relief and she discussed it with the 2nd defendant, the outstanding loan now stood at shs. 29,000,000/= (interest and penalty exempted) but with difficulties she had paid two installments only.

Dw2 Eligrolia Davis (35) holder of LLB and since 2009 2nd defendants' a loan recovery officer she stated that on application, and they were satisfied that the house being mortgaged was free of any 3rd party interests, the 2nd defendants granted the 1st defendant credit facility of shs. 150,000,000/= out of shs. 250,000,000/= requested by her (copies of the

offer letter, agreement and the general terms- Exhibit "D1") collectively also copies of the respective Certificate of Title and the 1st defendant's affidavit – Exhibit "D2") collectively. Copy of the mortgage deed- admitted as Exhibit "D3". That on default, but having issued one a notice of default, having had some discussions with the 1st defendant and upon investigations having been satisfied that she had been single, they commenced loan recovery measures and appointed brokers for auction and sale of the house (copy of the notice of default – Exhibit "D4").

Very briefly, thereafter followed counsels' oral submissions:-

Mr. H. Mwakalasya learned counsel submitted that be it a presumed or actual marriage there was no certificate but the two were since 1994 legally married (case of **Richard Majenga V. Specioza Sylivester**, Civil Appeal No. 208 of 2018 (CA) unreported) the couple having had lived together for two or more years much as under Section 8 of the Mortgage and Financing (Special Provisions) Act No. 17 of 2008 and amendments under Section 114 of the Land Act Cap. 113 the 2nd defendants should have taken all reasonable steps to ensure themselves that indeed as it stood, the 1st defendant was not married. The house therefore it was not a viable collateral under the circumstances. The learned counsel further contended.

In her reply submissions, Ms. Gigi Maajar learned counsel submitted; (a) that yet still the provisions of Section 8 of the Mortgage and Financing (Special Provisions) Act, 2008 applied in the 2nd defendants' favor more so by way of affidavit, and in express terms the 1st defendant having had stated that she was single and the house was solely in her name. No single

receipt produced to show that with respect to the house the plaintiff had been paying any electricity or water bills, no caveat registered or something (case of **Mwakalindile V. The NBC Holding Corporation** (2001)1 EA. No spousal consent therefore was required (b) that with respect to value of the house there was no copy of valuation report produced to show that indeed it stood at shs. 110,000,000/= or something (c) that the plaintiff may or may have not been entitled to general damages of shs. 450,000,000/= or more yes, but now that wrongly though he had specifically quantified it, by way of evidence one should have proved it to be worth the value (cases of **Masolele General Agencies V. African Inland Church of Tanzania** (1994) TLR 194 (CA) and **Edwin William Sheto V. MD of Arusha International Conference Centre** (1999) TLR 140. We humbly submit that the plaintiff has miserably failed to prove the case on balance of probabilities. We shall pray that the same be dismissed with costs. The learned counsel further contended.

The pivotal issue is whether between the plaintiff and 1st defendant in the eye of law the house was matrimonial much as these ones were not matrimonial proceedings but in their testimonies the two told this court that w.e.f 1996 or around there they had been husband and wife. The answer is not farfetched for **six** main reasons;

One that strangely though, there could be no certificate on Islamic marriage issued yes, but no respective Sheikh, "Walii", groom's or bride's parents/guardians or any other kind of witnesses appeared in court except the purported spouses. What a coincidence! Whether or not for a couple of years the two had cohabited each other it is immaterial in my considered

opinion. It would have been a different scenario which is not the case here, if it was one's contention that there existed a mere traditional or rather presumed marriage but not yet regularized at the time.

Two; in the absence of proof of marriage between them, if any, in consideration of natural love and affection or something the plaintiff may have only gifted her the house/plot (the Latin Maxim-Quic Quid Plantatul Solosolo Cedit) in which case therefore since then the same became as good as a self-acquired property which therefore in case of disposition of any kind it was not subject to spousal consent.

Three; at least it is an undeniable fact that with respect to the CT (Exhibit "D2") with effect from 2007 the **ninety nine** years leasehold had been in the sole name of the 1st defendant leave alone the latter's affidavit at the time regarding her marital status that she was single therefore disposition of the house needed no plaintiff's consent. I would therefore agree with Ms. Gigi Maajar learned counsel for the 2nd defendants that with the two pieces of evidence the latters' due diligence could not have reasonably exceeded there under the circumstances.

Four; with regard to her marital status of the day, the 1st defendant may have cheated, against the plaintiff sworn untruthful affidavit and therefore liable for criminal proceedings yes, but with greatest respect to Mr. Hary Mwakalasya learned counsel this one was no forum.

Five; without prejudice to the foregoing discussion, as against the plaintiff and the rest of the world, unless it was a self-acquired property and the possibilities could not be ruled out, unfairly though it is common

knowledge that in terms of command and powers it was dictated of some typical African traditions that males dominate it all that very seldom than not, even jointly acquired property were registered in husbands' names or where blessed with issues of marriage in the children's names. It would have been a different story only on that understanding was the certificate of title in such name(s) to suggest co-ownership over the house.

Six; the mortgage, in terms of validity at the 11th hour being raised by the plaintiff therefore "quietly" by way of afterthought questioned by the 1st defendant, possibilities were there that it might have been by design and plan of the plaintiff and 1st defendant because at times human nature was complex than human himself. For avoidance of doubts therefore I will hold that the house was worth the name not matrimonial for which disposition the plaintiff deserved right of a spousal consent.

When all is said, it cannot therefore be said that the plaintiff's case was on balance of probabilities proved. The devoid of merits suit is dismissed entirely with costs. It is so ordered.


Right of appeal explained.



S. M. RUMANYIKA
JUDGE
11/12/2020

Judgment is delivered under my hand and seal of the court in chambers this 11th December, 2020 in the presence of Mr. Harry Mwakalasya, learned counsel for the plaintiff, Ms. Gigi Maajar, learned counsel for the 2nd defendant and 1st defendant who appeared in person.




S. H. SIMFUKWE
DEPUTY REGISTRAR
11/12/2020