

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

LAND CASE NO. 128 OF 2020

MAHAMUDU MANGAPI.....PLAINTIFF

VERSUS

LEILAH I. NASIBU.....1ST DEFENDANT
SAMWEL NAKEI.....2ND DEFENDANT
OLAM TANZANIA LIMITED.....3RD DEFENDANT
JULIUS RAPHAEL NGEKELA.....4TH DEFENDANT
NZIGE AUCTION MART.....5TH DEFENDANT

Last Date of Submissions: 29.12.2022
Date of Judgment: 17.03.2023

JUDGMENT

V.L. MAKANI, J

The plaintiff in this suit MAHAMUDI MANGAPI is praying for judgment and decree against the defendants jointly and severally as follows:

- 1. A declaration that mortgage of the property described as Plot No. 859, Mbezi Beach within Kinondoni Municipality, Dar es Salaam (the **suit property**) which is matrimonial property as between the 1st, 2nd and 3^d defendant was unlawful hence null and void.*
- 2. This honourable court be pleased to order the 3^d defendant to receive from the plaintiff the sum outstanding plus interest thereto to be adjudicated by this court.*

3. *That this honourable court be pleased to order the 2nd defendant to reimburse the plaintiff with payments made by the plaintiff to the 3^d defendant in prayer (ii) hereinabove.*
4. *That this honourable court be pleased to restrain permanently the defendants from inhibiting the plaintiff's family peaceful enjoyment of the suit premises.*
5. *This honourable court be pleased to order the 1st 2nd and 3^d defendants to pay general damages to the plaintiff to be assessed by this honourable court.*
6. *This honourable court be pleased to order the 1st 2nd and 3^d defendant to pay costs of this suit.*

It states in the plaint that the plaintiff and the 1st defendant are husband and wife and at their subsistence of marriage they acquired a matrimonial property which is the suit property herein. It is further stated that the plaintiff came to learn that his wife, the 1st defendant, without any information offered the suit property as security to an undertaking between the 2nd defendant (their son-in-law) and the 3rd defendant. The undertaking was by way of a mortgage, and since the 2nd defendant could not account for TZS 101,342,420/=, the 3rd defendant sued both the 1st and 2nd defendants who were guarantor and borrower respectively. The plaint points out that the family was given notice to vacate the suit property and the suit property was sold to the 5th defendant. The plaint says for mitigation of the

damages the plaintiff has opted to pay the outstanding sum of TZS 101,342,420/= owed to the 3rd defendant and interest to be adjudicated by the court.

Before commencement of the hearing of the case, issues were framed in terms of Order VIIIID Rule 40(1) of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**) as follows:

(i) Whether the property described as Plot No. 859, Mbezi Beach claimed to be a matrimonial property was lawfully mortgaged and guaranteed by the 1st and 2nd defendants in favour of the 3^d defendant.

(ii) To what reliefs are the parties entitled to.

The plaintiff in this case was initially represented by Captain Bendera, but later Mr. Kamal Abdul and Baraka Mtelela, Advocates took over. The 1st defendant was represented by Mr. Godfrey Ukwonga, while the 3rd, 4th and 5th defendants had the services of Mr. Dennis Malamba, Advocate. The 2nd defendant did not enter appearance despite being duly served and so the matter proceeded ex-parte against him.

The first witness of the plaintiff was Suleiman Elias Nasibu (**PW1**). He said he is a long time friend of the plaintiff even before he married

the 1st defendant in 1980. He said the plaintiff and his wife were living in the suit property. He said on 01/05/2020 he was called by the plaintiff's daughter one Asha that they were people who were advertising sale of the house and when he went to see what was happening there was chaos and fortunately the leaders of *Serikali ya Mitaa* barred the said sale. He said his research revealed that there was a loan that was taken by the 2nd defendant and the 1st defendant offered the suit property as security. The lender was the 3rd defendant herein, that is, Olam Tanzania Limited. He said the plaintiff was not aware of the loan.

On cross examination he emphasized that the suit property is a family property and it belonged to the plaintiff, his wife and children and that the Certificate of Title is in the name of the plaintiff. He said the plaintiff said he would take responsibility to repay the loan. He later changed and said the Certificate was in the name of the 1st defendant and that the plaintiff is involved as he is the husband of the 1st defendant.

Jane Barongo (**PW2**) was the second witness for the plaintiff. She is the Principal Assistant Registration Officer of RITA and she said she was testifying to confirm that Mahamudu Mangapi (the plaintiff) and

Leila Iliasa (1st defendant) are married with Marriage Certificate No. 36080 (**Exhibit P2**). She said the marriage was conducted on 12/12/1980 in Nyalikungu, Shinyanga.

Waziri Masoud Mganga (**PW3**) was the third witness of the plaintiff. He is the Registration Officer at the Ministry of Lands (Registrar of Titles). He said according to the records, the suit property is registered under the name of Julius Raphael Ngekela (the 4th Defendant) who is owner by transmission of the law as per Commercial Case No. 31 of 2016. He said the court ordered sale and Julius Raphael Ngekela was the highest bidder. He said the previous owner of the suit property was Leila Nasib. He said according to the decree in Commercial Case No. 31 of 2016 there was a consent resulting to a loan by the 1st and 2nd defendants.

On cross examination he emphasized that the suit property now belongs to Julius Raphael Ngekela but previously it was owned by the 1st defendant and not the plaintiff. He said during the process of transfer there was no objection from anyone.

The witness for the 1st defendant was Asha Mahamudu Mangapi (**DW1**). She said she is the daughter of the plaintiff and 1st defendant. She said his father is in Kilindi doing mining business and that she was appointed the administratrix of the estate of her mother on 29/06/2021 (**Exhibit D1**). She said the 2nd defendant is her brother-in-law married to her sister Zaina Mahamudu Mangapi but they are now separated as her sister is in the USA and more so because of the dispute which is in court. She said she is in court to confirm that the suit property belongs to the family, and they have lived in that property in their lifetime. She said her father is claiming that there was no consent to the mortgage and the loan and that he was not aware of anything. He said his father was the one who built the house, that is, he supervised the construction. She pointed out that her father is claiming against her mother because he did not give consent that the suit property be offered as security to the loan taken the 2nd defendant of which her mother was guarantor. She said when the Certificate of Title (**Exhibit D2**) was taken by the 2nd defendant no one was aware until a year later. She said the family was not aware of the transaction and she personally became aware only after the case at the commercial court proceeded ex-parte and notices for sale were pasted in the house. She said her mother was not even

aware that the 3rd defendant had disbursed funds to the 2nd defendant as the money was not deposited in the joint account of the 2nd defendant, her sister and mother as agreed, she thus concluded that there was breach of contract. She insisted that there was no auction as confirmed by *Mwenyekiti wa Serikali za Mitaa*, but there was eviction on 03/11/2021. She said the Certificate of Title was in the name of her mother Leila Nasib.

In cross-examination **DW1** continued to insist that her father was not aware of the transaction between her mother, the 2nd defendant and her sister. She continued to say that there was a condition to the offer of the Certificate of Title that the 2nd defendant would open a joint account and her sister would have shares in the company of the 2nd defendant. **DW1** observed that they came to know later that the 2nd defendant was a conman, he had several wives and the marriage to her sister was a seventh marriage. She said she did not know the loan amount and the said amount was not shared by the mother or sister, but she admitted that her mother was a guarantor to the loan taken from the 3rd defendant and she also admitted that her mother had agreed to repay the loan but could not make it.

DW2, Said Suleiman Kikuwi, was another witness for the 1st defendant. He said he was *Afisa Mtendaji* of various places including Boko, Kunduchi, Mbezi Beach B and now Kilongawima since 2006. He said he knew the 1st defendant Leila Nasib as resident of Nyota Street, Plot J No. 859, Mbezi Beach. He said court brokers (Nzige Auction Mart) attempted a public auction in 2020 but there was chaos, so the auction did not proceed. He said the chaos was between the court brokers and the family because in practice where there is a public auction they have to go to the District Commissioner who instructs them to follow procedure. He said he was transferred in 2022 and has not heard any other public auction that has been conducted in respect of the suit property.

On cross examination **DW2** admitted that when there is a court order he has to implement it and not go against it. He also admitted that he did not bar the auction and neither did the District Commissioner. He said after the auction the 1st defendant was evicted and by then he was still the *Afisa Mtendaji* of the area.

DW3 was Jerry Edward Temba. He was witness for the 3rd, 4th and 5th defendants. He said he is an advocate and he was Head of Legal of the 3rd defendant. He said he knew the 2nd defendant who also

introduced the 1st defendant as his guarantor. He said he explained everything to the 1st defendant as guarantor about the loan to be taken by the 2nd defendant to buy crops as an agent. He said he informed the 1st defendant that with such loans a spousal consent was necessary, but the 1st respondent said her husband was deceased and the house belonged to her personally. He said the 2nd defendant received 101,000,000/= but he defaulted in repayment.

DW3 went on to inform the court that the 1st and 2nd defendants visited their offices with their advocate to see how they could repay the loan and they committed to repay the loan in two instalments but this commitment was not adhered to. So, they had file a case at the Commercial Court, that is, Commercial Case No. 31 of 2016 (**Exhibit D3**). The court ordered the 2nd defendant to pay the loan amount or otherwise the security offered should be sold to recover the loan amount. **DW3** said after the case the 1st defendant and her daughter Zaina visited the offices of the 3rd defendant requesting for the decree not to be executed so that she finds ways to repay the debt. The execution was suspended for three months paving way for the 1st defendant to make good the repayment of the loan but instead the 1st defendant decided to file Misc. Land Application No. 33 of 2018

challenging the decision that it was against a wrong party. He said the said application was struck out (**Exhibit D4**) but there was another application that was filed by the 1st defendant, Misc. Application No. 113 of 2019 (**Exhibit D5**) for setting aside the decision in Commercial Case No. 31 of 2016 which was also struck out. He said there was yet another application by the 1st defendant and Zaina Mahamudi, Misc. Commercial Application No. 68 of 2020 (**Exhibit D6**) to challenge the sale and set it aside, the said application was also dismissed. He said as they were trying to go for execution there was another application, Misc. Commercial Application No. 181 of 2020 (**Exhibit D7**) praying for extension of time to challenge Commercial Case No. 31 of 2016. He said this application was also met with a dismissal order. **DW3** prayed for the case to be dismissed as it is an abuse of the court process.

On cross examination **DW3** maintained that the 1st defendant never mentioned the plaintiff and they were informed that he was deceased, and she was declared a widow after signing an affidavit to that effect. He said the daughter of the 1st defendant and the son in law were all present when she said she is a widow and the property belonged to her from her maiden times. He said the 3rd defendant

was very lenient to the 1st defendant because it took a long time to execute the decision of the court.

DW4 was Morasco Ernest, Court Broker of Nzinga Auction Mart. He said they were instructed to attach and sell the house of the 1st defendant by an order of the court. He said the order arose from failure of the 3rd defendant to recover its loan from the 2nd defendant. The 1st defendant was a guarantor. He said the suit property was sold on 24/09/2019 but with several cases in court he failed to hand over the house to the buyer the 4th defendant but later he sought an order of the court which was granted, and the 1st defendant was evicted. On cross examination he said the house was sold at TZS 300,000,000/= and the eviction was in the presence of the police because *Serikali ya Mitaa* were not cooperative, but the auction proceeded, and the successful bidder was the 4th defendant.

DW5 was Julius Raphal Ngekela, the 4th defendant herein. He said he bought the suit property through a public auction conducted on 24/09/2019. He said he knew the 1st defendant as the owner of the suit property. He participated in the sale, and he was the successful bidder and was given a Certificate of Sale (**Exhibit D8**). He said there

were several cases thereafter and also people approached him for the matter to be amicably resolved but he said the 1st defendant was not ready to pay him or the debt. He said he was handed over the house and all the necessary documents and he has conducted transfer and he was issued with a Certificate of Title in respect of the suit property in his name. He said he does not know the plaintiff and he prayed for the suit to be dismissed so that he could enjoy the fruits of his purchase.

After the presentation of evidence by the parties, final submissions were filed by Counsel for the parties as was ordered by the court. The relevant parts of the submissions will be pointed out in the course of analysing the evidence by the parties.

I will now endeavour to consider the issues agreed upon and in so doing I will be led by the principle that whoever desires a court to give judgment in his/her favour, has to prove that those facts exist. This is reflected under sections 110 (1) (2) and 112 of the Law of Evidence Act CAP 6 2019. In the case of **Abdul Karim Haji vs. Raymond Nchimbi Alois & Another, Civil Appeal No. 99 of 2004** (unreported) the Court of Appeal held that:

".....it is an elementary principle that he who alleges is the one responsible to prove his allegations."

Thus, the burden of proof is at the required standard of balance of probabilities on the party who alleges (see the case of **Anthony M. Masanga vs. Penina (Mama Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014 (CAT)** (unreported)).

In the present case therefore, the burden of proof at the required standard of balance of probabilities is left to the plaintiff that the suit property was a matrimonial home and that he did not grant consent to the 1st defendant (his wife) to guarantee the loan taken by the 2nd defendant from the 3rd defendant. What this court is to decide upon is whether the burden of proof has been sufficiently discharged.

The first issue revolves around the lawfulness of the mortgage and guarantee by the 1st and 2nd defendants in favour of the 3rd defendant. It should be noted that the issue of the loan, mortgage, guarantee and the default were dealt with thoroughly in the High Court Commercial Division (the **Commercial Court**). The loan amount, the guarantee and security which is referred herein is the same as that dealt with in Commercial Case No. 31 of 2016 (**Exhibit D3**) which was decided in favour of the 3rd defendant herein. It is not disputed

through evidence that there is a decision of the Commercial Court, namely, Commercial Case No. 31 of 2016 which has not been appealed against to date. It is also not disputed that there were several applications to set aside the judgment and to investigate the claim of objection of sale of the suit property, but all these applications were dismissed, and the suit property was sold in a public auction (**Exhibits D4, D5, D6**). In essence therefore, there is a valid judgment and decree against the 1st defendant by the High Court on the same suit property which has not been appealed against and there is no order to the contrary. If a judgment and decree is given by this court there would be two conflicting decisions of the same court in respect of the same property and parties. In essence therefore this court is *functus officio*. In the case of **Cipex Company Limited vs Tanzania Investment Bank (TIB), Civil Appeal No.137 of 2018 (HC-DSM)** (unreported), the court quoted the case of **Malik Hassan Suleiman vs SMZ [2005] TLR 236** it was stated:

"A court becomes functus officio when it disposes a case by a verdict of guilty or by passing a sentence or making orders finally disposing of the case".

Further, the court cited the case of **Kamundi vs. R (1973) EA 540** where it was stated:

"A further question arises, when does the magistrate's court become functus officio and we agree with the reasoning in the Manchester City Recorder case that this case only be when the court disposes of a case by verdict of not guilty or of by-passing sentence or making some orders finally disposing of the case"

In the present case, as said above, this court is *functus officio* in that it cannot decide on the same property and parties of which a decree has already been executed by the High Court Commercial Division.

Without prejudice to the above, it should be noted that in his final submissions Mr. Kamal Abdul for the plaintiff dwelt so much on the issue of consent and that the suit property was a matrimonial home. But as said above, the issues of consent, mortgage, guarantee and the like were addressed in the proceedings at the Commercial Court because the court tested the genuineness of the loan vis a viz the borrowers and the guarantors. In the circumstances, this court cannot once again sit on appeal of its own decision.

In any case, according to the evidence before the court it was **PW1**, the plaintiff's friend and **DW1** the plaintiff's daughter who testified that the plaintiff did not give his consent to the mortgage and further that the suit property being a matrimonial home consent was

necessary. The evidence of **PW1** and **DW1** is purely hearsay, and according to the law, hearsay evidence tends to be unreliable as the best evidence is direct evidence. My brother Hon. Ng'wembe, J in the case of **Raphael Patroba Bwire vs. Triachem (T) Limited, Labour Revision No. 11 Of 2022 (HC-Morogoro)** (unreported) quoted the Black's Law Dictionary, (8th edition) at page 739 which discussed hearsay evidence as follows: -

"Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under rules of evidence."

Hon. Ng'wembe, J further quoted another writer Sir James Fitzjames Stephen, an English Judge, in his work A digest of the **Law of Evidence (1918), Courtright Publishing Company, Colorado** at page 9, who discussed the concept of hearsay evidence as follows: -

"Hearsay evidence is that which attempts to prove the event in question, not by the assertion of one who has personal knowledge of it, but by transmission of his extra judicial assertion through the medium of witness who knows not of the event, but of the former's narration in respect to it."

From the above quotes it is apparent that hearsay evidence is weak, and its evidential value is minimal especially where there are no circumstances supporting the allegations raised. In the present

instance, the record shows that **PW1** and **DW1** were informed by the plaintiff that he did not give his consent to the guarantee. There is no evidence that they participated in the meetings between the 1st, 2nd and 3rd defendants and there is nothing to show that indeed the plaintiff did not give his consent. The evidence of **PW1** and **DW1** on consent is therefore weak and cannot be relied upon.

It is worth pointing out that, the plaintiff never entered appearance in court to support the allegations raised in his plaint. **PW1** attempted to tender a Power of Attorney which was rejected by the court on account that there was no proof that the plaintiff was sick or was out of the country or that he was barred from coming to court for reasons of disability, old age or otherwise. The court was informed that the plaintiff was in Kilindi, Tanga continuing with his mining business. This means though the plaintiff had filed the case he decided not to come to court and give evidence. And in my considered view, the plaintiff in this case was the best person to explain to the court his relationship with the 1st defendant at the time when the loan was applied for by the 2nd defendant, and the alleged issue of his consent to the guarantee. Non-appearance of the plaintiff to prove his own case raises a lot of questions and creates an adverse inference as to

what is alleged in the plaint. In other words, it is very strange why the plaintiff would get into so much trouble of filing a case and then decide to abandon it. This practically means, there are things under the carpet and a critical analysis would query that if at all he had interest in the matter (especially the suit property) he would not have emerged now, but in the suit and the series of applications at the Commercial Court. In the circumstances, the plaintiff has failed to prove his own case to the standards required by the law of balance of probabilities.

For the reasons stated herein above, the plaintiff is not entitled to the reliefs prayed in the plaint or at all. The suit is thus dismissed with costs.

It is so ordered.




V.L. MAKANI
JUDGE
17/03/20231