

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

**LAND CASE NO. 323 OF 2022**

**ADOLPHINA FRANCE KIMARIO.....PLAINTIFF**

**VERSUS**

**TIRBUS MICHAEL MWACHA.....1<sup>ST</sup> DEFENDANT**

**KCB BANK TANZANIA LIMITED.....2<sup>ND</sup> DEFENDANT**

**YONO AUCTION MART.....3<sup>RD</sup> DEFENDANT**

**RENATH DIONIS MUSHI.....4<sup>TH</sup> DEFENDANT**

**J U D G M E N T**

*Date of Last Order: 12.09.2023*

*Date of Judgment: 29.09.2023*

**T. N. MWENEGOHA, J.**

At the centre of the dispute in the present are two landed properties, described as Plot No. 19, Block D, with Certificate of Title No. 56141, located at Sinza Area, Ubungo Municipality in Dar es Salaam Region, also Plot No. 126, Block E, with Certificate of Title No. 79865, located at Kariakoo Area, Ilala Municipality, Dar es Salaam Region, hereinafter called, the suit properties. These properties, as per the plaintiff, are matrimonial, having been acquired through joint efforts by the plaintiff and the 1<sup>st</sup> defendant respectively, during their marriage life. According to the facts, stated in the plaint, both properties were used by the 1<sup>st</sup>

defendant as security for the loan from the 2<sup>nd</sup> defendant, to the tune of Tshs 800, 000,000/= . The mortgage in question, was arranged, without the consent of the plaintiff, a wife of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant failed to repay the loan as agreed. This prompted the 2<sup>nd</sup> defendant to instruct the 3<sup>rd</sup> defendant to auction of the suit properties. Consequently, the suit properties were sold to the 4<sup>th</sup> defendant, following a public auction conducted by the 3<sup>rd</sup> defendant. Now, the plaintiff is on the war, to regain ownership of the suit properties. In this suit, she is seeking for the following Orders; -

- 1. A declaration that, the disposition of the suit properties by way of mortgage was illegal.**
- 2. A declaration that, the purported sale was unlawful as it originates from the illegal mortgage.**
- 3. Permanent Injunction, restraining the defendants or any person acting for them, from trespassing on the suit properties or doing any activity there-in.**
- 4. Costs of the suit.**
- 5. Any other relief this Court may deem fit to grant.**

The 1<sup>st</sup> defendant on his part, did not deny the claims against him. As for the 2<sup>nd</sup> to 4<sup>th</sup> defendants, the denied all claims against them and demanded strict proof from the plaintiff. On that account, the following issues for determination were agreed by parties; -

- 1. Whether, the plaintiff's consent was needed for the mortgaged properties.**
- 2. Whether, the plaintiff consented to the mortgage.**
- 3. To what reliefs the parties are entitled to.**

The plaintiff's case was led by the testimony of PW1, Adolphina Francis Kimario (the plaintiff herself). She testified that; the 1<sup>st</sup> defendant is her husband, since 1994 and they have 5 children together. The 2<sup>nd</sup> defendant is the one who entered into a loan agreement with her husband, the 3<sup>rd</sup> defendant is a broker who auctioned the suit properties, while the 4<sup>th</sup> defendant is the purchaser of the properties in dispute. That, her husband took a loan from the 1<sup>st</sup> defendant. The amount he took was unknown to PW1 as she was not part of it. That, her husband is a business man. That, she became aware of the existence of the loan after the tenants in the suit properties went to her claiming a refund of their rents as the said houses have been sold by the bank and there was a person who appeared before them, claiming to be the owner of the said houses, that person is Renatus Mushi.

It was a testimony of PW1 that she made a follow-up thereafter and found the Title Deeds for the suit properties are with the Bank, (the 2<sup>nd</sup> defendant). PW1 insisted that, she never knew about the loan or the mortgage in question. That, she found her pictures and signatures on the loan agreement, but she did not consent to it. That, all this led to misunderstandings with her husband leading to their separation.

She claimed that all the disputed properties are matrimonial properties. That, as a result of auction she has nowhere to live, consequently, she currently rents a house somewhere else and she does not know where the 1<sup>st</sup> defendant lives.

It was her contention further that both houses were sold undervalue. That, their property in Kariakoo, which was acquired in 2003 was sold at 650 million and the one at Sinza was sold at 450 million. That, the property at Sinza is worth about 1.5 billion Tanzania Shillings and the one at

Kariakoo is more than 2 billion Tanzania Shillings. That, the Sinza property is a 7-storey house, made for hotel business. She insisted that, she did not consent to the mortgage, therefore, this Court should declare the same as null and void.

When cross-examined by Advocate Msuya, PW1 insisted that, both houses in dispute are matrimonial properties. That, the names appearing on the Title Deeds are of her husband. That, they once lived in those houses before they decided to lease the same. That, she did not tender any valuation report to prove the value of the suit properties. That, it is true that, both houses were not matrimonial homes but they are owned jointly between her and her husband. That, her signature was forged, though she has never reported the matter to the police.

On re-examination, PW1 stated that, they lived at Kariakoo since 2003. That, after her houses were sold, she consulted her relatives on the matter. That, in this case, she is wants her houses back. That marked the end of the plaintiff's case.

The 1<sup>st</sup> defendant did not appear during the hearing of the case. Therefore, the Court proceeded ex-parte against him. As for the remaining defendants, their case, was led by the testimony of DW1, Damas Mwangange, a Legal Officer for the 2<sup>nd</sup> defendant. He testified on behalf of the 2<sup>nd</sup> to 4<sup>th</sup> defendants. It was his testimony that the suit premises, together with another property, located at Plot No. 1 Block 15, Mji Mpya, within Dodoma Region were given as security for the loan. That, the 1<sup>st</sup> defendant obtained a loan facility from the 2<sup>nd</sup> defendant. He tendered the loan facility which was admitted as Exhibit D1 and documents for mortgage of right of occupancy which were received as Exhibit D2.

He testified that, the said mortgage were given by the 1<sup>st</sup> defendant in favour of the 2<sup>nd</sup> defendant. That, all of the mortgages were consented by the 1<sup>st</sup> defendant's spouse. He tendered a consent form and the same was received as Exhibit D3. Also, a consent to create mortgage between the plaintiff and the 1<sup>st</sup> defendant, was received as Exhibit D4. That, the plaintiff as a wife of the 1<sup>st</sup> defendant signed on the consent forms before Advocate Jane Gerald. Both documents have photos of the plaintiff and her signature. That, the 1<sup>st</sup> defendant failed to repay the loan, hence the mortgaged properties were sold in a public auction to recover the amount due.

He narrated further that in 2021, the 1<sup>st</sup> defendant sued the 2<sup>nd</sup> defendant over the same properties, vide Land Case No. 28 of 2021. DW1 tendered a copy of Judgment and the Court took Judicial Notice of it, under **Section 59 of the Evidence Act, Cap 6 R. E. 2019**. He continued to state that, in the said case, the issue in dispute was illegal sale of the suit houses and that they were sold under value. That, at the auction, the 4<sup>th</sup> defendant was the highest bidder. DW1 tendered Title Deeds with the name of the 4<sup>th</sup> defendant and the same were received as Exhibit D5 collectively. That, according to Exhibit D5, both properties are owned by the 4<sup>th</sup> defendant.

When cross-examined by Advocate Mwakyembe, DW1 insisted that, he is an Advocate of the High Court of Tanzania. That, the 1<sup>st</sup> plaintiff was part of the Land Case No.28 of 2021. That, the issue of spouse consent was not discussed in the said case. That, in Exhibit D3, the plaintiff was introduced by Mr. Abel Msatta, an officer of the 2<sup>nd</sup> defendant. She was supposed to be introduced by a business banker. That, the borrower has

to produce an affidavit as to marital status. That, it is only the house at Dodoma that needed a spouse consent as the same was a matrimonial house. That, the Sinza and Kariakoo houses do not need spousal consent as they are business properties. That, Exhibit D4 was used for Kariakoo and Sinza properties in the rescheduling of the loan in 2019. The one who has filed this case is Adolphina France Kamario and not Adolphina Tirbus. That, the plaintiff did not produce any affidavit as to change of names. That, Advocate Jane Gerald was retained by the 1<sup>st</sup> defendant not the Bank. That, DW1 was not present when the plaintiff signed the spousal consent, but looking at the two signatures, they are the same. That, as per Exhibit D4, all properties have been termed as matrimonial assets. That, there is a difference between a matrimonial property and a matrimonial home. That, there was a valuation report over the said properties, but he did not produce it, instead there is a Judgment giving the value of the properties.

On re-examination by Advocate Msuya, DW1 states that, the plaintiff is the one who was under obligation to bring Advocate Jane Gerald as she was engaged by her husband. That was the end of the defense case and the parties had the chance to file their final submissions, through their counsels.

Advocate Mwakyembe for the plaintiff in his submissions insisted on the 1<sup>st</sup> & 2<sup>nd</sup> issues that, the plaintiff has managed to prove that she did not sign any spouse consent. She was not even aware of the existence of the mortgage transaction as she did not consent to the same. Since, all of the properties in question are matrimonial properties, acquired jointly, by the plaintiff and the 1<sup>st</sup> defendant, a consent of the plaintiff prior to the mortgage transaction was needed, as stated in **National Bank of**

**Commerce Limited versus Rurbano Abdallah Mulla, Civil Appeal No. 283 of 2017, Court of Tanzania, at Tanga.** Therefore, under **Section 110(1) & (2) and Section 112, of the Evidence Act, Cap 6 R. E. 2019**, the plaintiff has discharged her burden of proof. The Court should pronounce the Judgment in her favour as stated in **Yusuph Seleman Kimaro versus Administrator General & 2 Others, Civil Appeal No. 266 of 2020, Court of Appeal of Tanzania at Dar es Salaam, (unreported)**. That, she is entitled to the reliefs sought in the plaint. This Court should make a declaration that, the disposition of the suit properties by mortgage was unlawful for want of spouse consent and that, the purported sale is unlawful as it emanates from unlawful mortgage.

Advocate Msuya, submitting for the 2<sup>nd</sup> to 4<sup>th</sup> respondent, insisted on the 1<sup>st</sup> and 2<sup>nd</sup> issue that, the suit properties were not used as matrimonial home, within the context of **Section 112 of Land Act, Cap 113, R. E. 2019**, read together with **Section 59 of the Law of Marriage Act, Cap 29, R. E. 2019**, the same did not need a consent of a spouse. That, the evidence has shown from PW1 and DW1, that the suit premises were used for commercial purposes. The plaintiff and the 1<sup>st</sup> defendant never lived in the said houses. It obviously that, the plaintiff was not required to consent in the mortgage, basing on the nature of the properties as explained above. Therefore, the 1<sup>st</sup> and the 2<sup>nd</sup> issue have been negatively answered. Mr. Msuya cited a number of authorities to cement his arguments on the 1<sup>st</sup> and 2<sup>nd</sup> issues. To name few, include the case of plaintiff prior to the mortgage transaction was needed, as stated in **National Bank of Commerce Limited versus Rurbano Abdallah Mulla, supra**. Also, the case of **Harold Sakieta Levira & Another**

**versus African Banking Corporation Tanzania Limited (Bank ABC) & Another, Civil Appeal No. 46 of 2022, Court of Appeal of Tanzania at Dar es Salaam, (unreported).** Therefore, the plaintiff is not entitled to the reliefs claimed. Her suit is devoid of merits and should be dismissed.

Having summarised the evidence of both parties, along with the closing arguments from their respective counsels, I will now proceed to determine the issues framed in this suit. In doing so, I will consolidate the 1<sup>st</sup> and 2<sup>nd</sup> issues and discuss them together as they relate to each other. The 1<sup>st</sup> issue is whether the plaintiff consented to the mortgage of the suit properties and the 2<sup>nd</sup> is whether the said consent was needed in the first place.

Witnesses from both sides gave testimonies to prove the two issues raised. PW1, Adolphina France Kimaro focused on showing that, being a legal wife of the 1<sup>st</sup> defendant, she has interest in the suit properties as the same are matrimonial ones. Hence as a spouse of the 1<sup>st</sup> defendant, her consent was inevitable to be given, prior to the mortgage transaction between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant. As for DW1, Dismas Gabriel Mwangange, he insisted that, the suit properties were not matrimonial homes, hence there was no need to obtain the consent of the plaintiff, prior to the conclusion of the mortgage transaction over the same. Even the closing arguments filed by their counsel, took the position of these witnesses.

I commend the efforts of both counsels in building their cases. Unfortunately, this effort was misguided and the whole exercise is like did is build castles in the air, an impossible and improbable task. I say so, because, the two first issues for determination in the present case are not



determinable, owing to the existence of Decision given by Hon. Gwae J, vide Land Case No. 28 of 2018. Both parties are aware and have expressed the presence of former case in their testimonies and have even provided the Judgment to the Court. Not only that parties are aware of Land Case No 28 of 2018 but they had a chance of refereeing to it in Court. In other words, the instant case is res judicata to the former case before Hon. Gwae J. Therefore, this case is barred by the mandatory provisions of **Section 9 of the Civil Procedure Code, Cap 33, R. E. 2019**. For quick reference, I will reproduce section 9 as follows; -

*"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court."*

Firstly, to start with the parties. In the former case, parties were Tirbus Michael Mwacha as the plaintiff, (now 1<sup>st</sup> defendant), against the 2<sup>nd</sup> to 4<sup>th</sup> defendants. In the present case, the plaintiff is a wife of the plaintiff in the former case, so she is litigating under the cause of action against the 2<sup>nd</sup> to 4<sup>th</sup> defendants who were also defendants in Land Case No. 28 of 2021, originating from Tirbus Michael Mwacha, the plaintiff in the former case.

Secondly, the subject matter of the two suits is the same. The suit properties forming the foundation of this case, are the same to the ones that were discussed and decided in the former case. They are the same

properties that Hon. Gwae J, declared to have been bonafidely purchased by the 4<sup>th</sup> defendant herein above, (3<sup>rd</sup> defendant in the former suit). In that regard, this Court cannot make any decision that will affect the purchase and current state of the properties, as far as their ownership is concerned, the that issue has already been decided by Hon. Gwae, J.

Thirdly, I look at the agreed issues for determination in this case, especially the 1<sup>st</sup> and 2<sup>nd</sup> issues above stated. Indeed, they are substantially the same as those determined in Land Case No. 28 of 2021. There is no way, this Court can escape in its discussion of the first two issues without touching the legality of both, the mortgage transaction itself and the sale of the suit properties. But, the legality of mortgage arrangement between the 1<sup>st</sup> and 2<sup>nd</sup> defendant was not challenged in the former case. Consequently, the Court made a declaration that, the 1<sup>st</sup> defendant failed to discharge his contractual obligations set in the facility letter. This implies that, the question of whether the mortgage was legal or not, regardless of the reasons, cannot be discussed again. That discussion was long closed in Land Case No. 28 of 2021, **(see page 12-18 of the typed Judgment of Land Case No. 28 of 2021)**.

Lastly, the reliefs prayed in this case are also substantially the same as those prayed by the 1<sup>st</sup> defendant in the former case. In the case at hand, one of the reliefs sought by the plaintiff to invalidate, the sale of the properties to the 4<sup>th</sup> defendant. This relief was also prayed and failed in the former case, where the Court declared the sale to have followed the procedures and the 4<sup>th</sup> defendant is a bonafide purchaser **(see page 22 of the typed Judgment of Land Case No. 28 of 2021)**. Therefore, to allow another discussion touching the validity of sale is to disturb the 4<sup>th</sup>

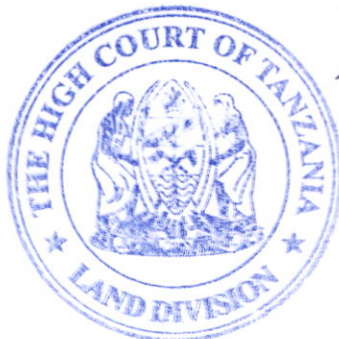
defendant as a bonafide, see **Stanley Kalama Masiki v. Chihiyo Kuisia w/o Nderingo Ngomuo [1981] TLR 143.**

Further, in case of **Peniel Lotta Vs. Gabriel Tanaki And Others Civil Appeal No. 61 of 1999 (2003) TLR page No. 314**, the Court had pointed out these conditions for a matter to fall under *resjudicata* rule; -

- (i) *The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit.*
- (ii) *The former suit must have been between the same parties or privies claiming under them.*
- (iii) *The parties must have litigated under the same title in the former suit.*
- (iv) *The Court which decided the former suit must have been competent to try the subsequent suit.*
- (v) *The matter in issue must have been heard and finally decided in the former suit."*

It is my humble opinion therefore, that this case, fits well within the *resjudicata* rule. The same was not even supposed to be filed, let alone being heard on merits. For the reasons I have wondered to give herein above, I find the same to be incompetently filed. Consequently, the case is struck out with costs.

Ordered accordingly.



  
**T. N. MWENEGOHA**

**JUDGE**

**29/09/2023**