IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 283 OF 2017

NATIONAL BANK OF COMMERCE LIMITED ..... APPELLANT

VERSUS

NURBANO ABDALLAH MULLA ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tanga)

(Benhajj, J)

Dated 7thday of November, 2016
in
(Land Case No.20 of 2015)

JUDGMENT OF THE COURT

25th February & 8th April, 2020

MZIRAY, J.A.:

In the High Court of Tanzania at Tanga, the respondent herein sued the appellant jointly and together with Unicord Tanzania Limited, Abdulrahim Mulla, Hemedi Mndeme and Comrade Auction Mart Limited who were 2nd, 3rd, 4th and 5th defendants in the High Court but are not parties to the instant appeal. We should put it clear at the outset that Abdulrahim Mulla is the husband of the respondent.

The background to this appeal can be traced way back in the year 2006 when the respondent consented to the mortgage of a house on

plot No. 81 KBXVI, Raskazone area, within Tanga Municipality under certificate of title No. 1034 (the suit property) for an overdraft facility of Tshs.100,000,000/= which was extended to Unicord Tanzania Limited by the appellant. On 24/3/2009, the respondent received a notice of default demanding the payment of a sum of Tshs.501,490,205/03, a copy of which was served upon one Leila Abdulrahim Mulla who is the first wife of Abdulrahim Mulla. The respondent realized later on that, without her knowledge and consent, her husband Abdulrahim Mulla had extended another overdraft facility to Unicord Tanzania Limited using the title deed of the suit property as a collateral to the overdraft facility. As the debt was not paid, subsequently the suit property was auctioned by the Comrade Auction Mart and sold to Hemedi Mndeme who was the fourth defendant in the High Court, to recover the money of the appellant.

Being dissatisfied with the alleged sale, the respondent instituted a suit in the High Court vide Land Case No. 204 of 2015. In that suit the defendants defaulted to lodge their written statement of defence and for that reason the suit was heard and determined exparte. The High Court gave a verdict in favour of the respondent upon which the sale of the suit property was declared null and void. Being dissatisfied, the appellant lodged this appeal.

When this appeal came for hearing, Mr. Wilson Ogunde, learned advocate for the respondent informed the Court that in view of the coming into force of the Overriding Objective Principle, he was withdrawing the preliminary objection he filed earlier on; a prayer which was not resisted by Mr. Denis Maringo, learned advocate for the appellant. We marked the preliminary objection withdrawn as prayed.

Mr. Maringo in his oral submissions adopted the contents of the memorandum of appeal and the written submissions. He prayed to abandon the first ground of appeal. He then proceeded to argue the two remaining grounds of appeal jointly. The gist of the complaint in the two grounds of appeal is that the trial judge erred in law in holding that the mortgage of the suit property was a nullity for want of respondent's consent while there was no evidence that the suit property was a matrimonial home. Submitting in these grounds, Mr. Maringo argued that the real question in controversy is whether the trial judge was correct in deciding that consent was necessary in the subsequent overdraft facilities. It is the contention of the learned counsel that the trial judge contradicted himself when he stated that consent was required while he had already made a finding that the suit premises was not a matrimonial home. In his view, since consent was not a requirement, the trial judge was not justified to make a finding that the

auction and sale of the suit property was a nullity in terms of the provisions of section 112 (1) of the Land Act Cap. 113 of the Revised Edition 2002 (the Land Act). He invited this Court to make a clear clarification of the phrase *matrimonial property* and *matrimonial home*. He prayed this Court to fault the decision of the trial judge in holding that consent must be sought even if the property is not a matrimonial home. He argued that the trial judge's decision was more inclined on section 161 (3) of the Land Act and completely disregarded the provisions of section 112 of the said Act which according to him was most relevant and specific on the issue. He further argued that whereas section 161 (3) only imposes a requirement to seek consent, on the other hand section 112 goes further in specifying under which circumstances consent is required.

The learned counsel stressed that the finding of the trial judge was wrong because the suit property was registered in the name of Abdulrahim Mulla alone and that it was not a matrimonial home hence consent was not required. He clarified that not all matrimonial properties are matrimonial homes and in the case at hand the suit property was not a matrimonial property because it was not jointly acquired and registered in the name of the two spouses. As regards the subsequent sale of the suit property, he seriously contended that it

followed the procedure under the law. Lastly, he cautioned that there should be a distinction between a matrimonial property and a matrimonial home. He submitted that the trial judge failed to make that distinction as a result he invoked inapplicable provisions of the law which ultimately led him to arrive at an erroneous decision. Having argued to that extent, he prayed for the appeal to be allowed with costs.

In reply, Mr. Ogunde prayed to adopt his written submissions except for the submissions in respect of the first ground of appeal which had been abandoned.

In response to the submissions of Mr. Maringo, Mr. Ogunde referred us to the issues which were framed by the High Court at page 10 of the record of appeal and specifically to issues No. 2, 3 and 4. He said the three issues basically is the thrust of the two grounds of appeal raised by the appellant. Issue No. 2 was whether consent of the respondent was sought. Submitting on this issue, Mr. Ogunde stated that, there was no dispute that an overdraft facility of Tshs.100,000,000/= was extended and one of the conditions was to require the wife's consent. He argued that the only consent of the respondent is reflected at page 235 of the record of appeal, which was admitted as exhibit P2, given in 2006 in the first overdraft facility. He argued with force that the other subsequent overdraft facilities in the

year 2007 and 2008 were advanced but this time around there was no consent sought from the respondent as shown in exhibit P3 tendered.

The learned counsel submitted and insisted that consent of the respondent was necessary in view of the fact that the mortgage was registered in the respondent's husband. He agreed with the finding of the trial judge that the provisions of section 161 (3) of the Land Act was applicable in the circumstances of the case. He maintained that even though the suit property was in the name of the respondent'shusband, in law it was a matrimonial property and the subsequent overdraft facilities required the consent of the respondent before being sanctioned by the appellant. The learned counsel is of the view that it was necessary for consent to be obtained because the respondent was the lawful wife of the third defendant. For the above stated reasons, he fully supports the findings of the High Court and the interpretation of the law made by the trial judge and the conclusion to the effect that the sale of the suit property was a nullity. He therefore prayed for the appeal to be dismissed with costs.

In a short rejoinder, Mr. Maringo still does not agree with the finding of the trial judge that consent was required to the two subsequent overdraft facilities. He concluded that the property was not a matrimonial home and for that reason the trial judge was wrong to

ignore the import of section 112 of the Land Act. According to him, even the original consent was not necessary as it was superfluously made for cosmetic purposes. He therefore prayed for the appeal to be allowed with costs.

To start with, we find that there are two contentious issues in this appeal. One, whether the mortgaged property was a matrimonial home and two, whether consent was required in the subsequent overdraft facilities extended to Unicord Tanzania Limited. The phrase matrimonial home is defined under section 2 of the Law of Marriage Act, Cap. 29, R.E. 2002 and the said section is in *pari material* with section 112 (2) of the Land Act, which provides that;

> *"matrimonial home means the building or part of a building in which the husband and wife ordinarily resides together . . ."*

From the above provision, we are of the considered view that a property will be termed a *matrimonial home* when the spouses ordinarily occupied it as their family residence. On the other hand the phrase *matrimonial property* has a similar meaning to what is referred as *matrimonial asset* and it includes a *matrimonial home* or *homes* and all other real and personal property acquired by either or both spouses before or during their marriage. (See **Gabriel Nimrod Kurwijila v.**

Theresia Hassani Malongo, Civil Appeal No. 102 of 2018 (unreported). For that reason, we think that not all real properties acquired by the spouses during the subsistence of the marriage are *matrimonial home*. The phrase *matrimonial home* therefore should in our view confine to the house where the spouses ordinarily resides.

Having attempted to make a distinction of the phrases *matrimonial home* and *matrimonial property* we find that it is evident from the plaint lodged in the High Court particularly at paragraph 9 of the plaint that the suit property was a matrimonial home acquired through joint efforts of the respondent and her husband. For ease of reference paragraph 9 of the *plaint reads;*

> *"Through joint efforts as husband and wife the plaintiff and the 3rd defendant have been able to acquire a house on Plot No. 81 KB XVI Raskazone area, Tanga municipality under CT No. 1034* ***which house is their matrimonial home."***
>
> *[Emphasis ours].*

This assertion is not disputed by the appellant in his written statement of defence. In the contrary, this assertion is fortified in the testimony of the respondent at page 000228 where she stated that;

"The banks agent once came to auction the house

while I was inside with my children."

[Emphasis ours].

This piece of evidence to us suggests that at the material time the respondent and her children were residing in the suit property at the time of the auction hence the same was a matrimonial home within the meaning ascribed under sections 2 of the LMA and 112 (2) of the Land Act. It was not correct therefore as found by the trial judge in his judgment at page 242 of the record of appeal that there was no evidence adduced to establish that the residence of the respondent and her family was in the suit property. On our part we find that such evidence did exist and has sufficiently established on a balance of probabilities that the suit property was a matrimonial home on account of the fact that the respondent and her children were residing therein. Additionally, the same is a *matrimonial property* having been acquired during the subsistence of the marriage. Since this was a land case and the main issue was on a mortgage and not a petition for divorce and the distribution of matrimonial properties then the issue of extent of contribution on the side of the respondent is of no essence.

We now move to the second issue as to whether the respondent consented to the subsequent overdraft facilities of Tshs.500,000,000/=.

As could be revealed from the record, the mortgage transaction between the respondent's husband and the appellant was presumably performed in accordance with the provisions of section 114 (1) (a) of the Land Act, which provides that;

> *"A mortgage of a matrimonial home including a customary mortgage of a matrimonial home* ***shall*** *be valid only if*
>
> *(a) any document or form used in applying for such a mortgage homes is signed by,* ***or there is evidence from the document that it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in that matrimonial home . . ."*** *[emphasis ours)*

We are aware of the amendments made in 2008 through the enactment of the Mortgage Financing (Special Provisions) Act, 2008 but we did not consider this amendment due to the fact that all the mortgage transactions in the suit before the High Court were done prior to the enactment of this legislation.

From the wording of section 114 (1) (a) of the Land Act, the word **shall** implies that consent from a spouse or spouses is a mandatory

requirement when one of the spouses intends to mortgage a matrimonial home. As we have pointed out earlier, it is an undisputed fact that the consent of the respondent over the mortgaged property was obtained and preceded the issuance of the first overdraft facility of Tshs.100,000,000/=. However, the situation was not the same on the second overdraft facility of Tshs.500,000,000/= when the respondent's spouse mortgaged the same property without obtaining/seeking her consent. We think that, like in the first arrangement, before finalizing the loan issuance procedures, the appellant had an obligation to ascertain the marital status of the mortgagor as envisaged under section 114 (2) of the Land Act which provides;

> *"For the purpose of subsection (3), it shall be the responsibility of a mortgagee* ***to take reasonable steps to ascertain whether the application for a mortgage has a spouse or spouses consent."*** *[emphasis ours].*

That duty is not casted upon only on the appellant's side but also on the part of the mortgagor has a reciprocal duty to disclose the information of the spouse(s) as stated under regulation 4 (1) of the Land (Mortgage) Regulations, 2005 that;

"If the applicant states that he or she is married, requiring that applicant to state the names and address of his or her spouse ***or in the case of a male applicant, the names and addresses of his spouses if he has more than one . . .***" *[emphasis ours].*

From the above position of the law we are certain that the failure of the appellant to obtain a consent from the respondent for the second overdraft facility was in contravention of the mandatory requirement under section 114 of the Land Act as the appellant knew for sure that the respondent was the wife of the mortgagor. In that respect it was expected for the appellant to seek consent just like what she did in the first overdraft facility. She was expected to do the same in the subsequent overdraft facility. She did not do so. In our respective view, the fault has to be shouldered by the appellant for failure to take due diligence to comply with the provision of the law. In addition, as rightly held by the trial court, the provisions of section 161 (3) of the Land Act imposes a duty on a spouse who holds a dwelling house in his name to undertake a disposition by mortgage after obtaining consent from the other spouse. The said provision reads as follows:-

"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

(a) 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 in accordance with the provisions of section 59 of the Law of Marriage Act, Cap. 29."

Deducing from the above provision, it is clear in our minds that even if the mortgaged property is under the name of one spouse alone, then he/she cannot deprive the other spouse his right over the mortgaged property. Merely because the suit property was in the name of the respondent's husband one Abdulrahim Mulla, then that does not necessarily mean that the respondent has no interest whatsoever in the suit property. It is at this point we tend to agree with the trial judge at page 16 of the judgment that;

"Since I am of the opinion that the consent was mandatory for the said extension and variation, the failure to obtain the consent from the plaintiff has had the effect of rendering the whole extension null and void."

On the foregoing reasons, we uphold the decision of the trial High Court and dismiss this appeal with costs.

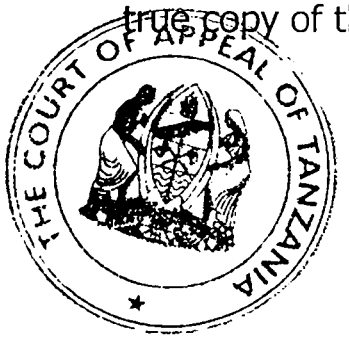
DATED at **DAR ES SALAAM** this 10th day of March, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 8th day of April, 2020 in the presence of Mr. Yona holding brief for Mr. Denis Maringo learned Advocate for the Appellant and Mr. Ahmad Abdallah holding brief for Mr. Nelson Ogunde learned Advocate for the Respondent is hereby certified as a true copy of the original.



V. M. NONGWA
Ag. DEPUTY REGISTRAR
COURT OF APPEAL