IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., KIHWELO, J.A And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 280 OF 2020

TANZANIA COMMERCIAL BANK PLC (FORMERLY KNOWN AS TWIGA BANCORP).....1ST APPELLANT
TAMBAZA AUCTION MART .....2ND APPELLANT
THOMAS BARNABAS MMBANDO .....3RD APPELLANT

VERSUS

MRS. SHAKILA PARVES.....1ST RESPONDENT
MUTABASAM PARVES SHABBIRDIN.....2ND RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Matupa, J.)

dated the 30th day of October, 2017

in

Land Case No. 46 of 2015

.....

JUDGMENT OF THE COURT

20th September & 7th November, 2023

MWAMPASHI, J.A.:

This appeal seeks to challenge the decision of the High Court of Tanzania at Mwanza (Matupa, J.) dated 30.10.2017 in Land Case No. 46 of 2015. The facts from which the appeal arises, albeit in brief, are as follows; The respondents namely, Mrs. Shakila Parves and Mutabasam Parves Shabbirdin (henceforth the 1st and 2nd respondents respectively) got married in 2002 and went to dwell in a house standing on Plot No. 80 Block "L" Nkrumah Street, Mwanza City (the Mortgaged House) which, by then, was registered in the name of the 2nd respondent.

In 2013, it came to the knowledge of the 1st respondent that, without her knowledge and consent, her husband, that is, the 2nd respondent, had applied for and obtained a loan from Twiga Bancorp Limited now Tanzania Commercial Bank PLC (the 1st appellant) and further that their matrimonial home, that is, the Mortgaged House, had been mortgaged for that purpose. For reasons that will be apparent in the course of this judgment, the above stated mortgage will, preferably, be referred to as "the Second Mortgage". The 1st respondent also realised that upon default by the 2nd respondent, the 1st appellant instructed Tambaza Auction Mart (the 2nd appellant) to sell the Mortgaged House by public auction and that the same was thus sold to Thomas Barnabas Mmbando (the 3rd appellant).

Believing that the Second Mortgage and the sale of the Mortgaged House were a nullity for want of her consent, the 1st respondent instituted a suit in the High Court, that is, Land Case No. 46 of 2015, against the 2nd respondent jointly and together with the appellants. In that suit, the 1st respondent prayed for the judgment and decree for:

(a) *A declaration that any alienation of the house situated on Plot No. 80 Block "L" Nkrumah Mwanza City is voidable by the plaintiff for lack of her consent.*

(b) *An order annulling the mortgage made without the plaintiff's consent.*

(c) *A permanent injunction against the 2nd, and 3rd defendants against any sale whether by public or private treat of the said house.*

(d) *An order directing the 1st defendant to take measures to ensure that the suit house is not sold.*

(e) *General damages*

(f) *Costs of the suit*

(g) *Any other or further relief the honourable court may deem fit and proper.*

While, according to his written statement of defence, the 2nd respondent supported the 1st respondent's case, the appellants did not. In their joint written statement of defence, the appellants stated that the Mortgaged House was mortgaged in 2004 (the First Mortgage) before it was lawfully sold to the 3rd appellant in 2015. They further stated that the First Mortgage was executed after the required consent from one Rukia Parves, who was introduced by the 2nd respondent to be his spouse, had been sought and obtained for that purpose. The relevant consent by Ms. Rukia Parves was tendered in evidence and admitted as exhibit D2.

In its judgment, the High Court, having considered the evidence on record, held that the consent obtained from Rukia Parves (exhibit D2) in 2004, was for the First Mortgage in respect of the loan which was granted to the 2nd respondent's company known as Shabbirdin and Co.

Ltd and not to the 2nd respondent. According to the High Court, the said consent could not have been made for purposes of any other loan that would be taken by the 2nd respondent. It was also found established from the evidence that the Second Mortgage and the loan advanced in 2013, the subject to the sale of the Mortgaged House, were independent from the First Mortgage and the loan which was advanced to the Company in 2004. The Second Mortgage was thus found invalid for want of spousal consent. Consequently, the said Second Mortgage and the sale of the Mortgaged House were declared invalid and were accordingly nullified by the High Court.

Aggrieved by the aforesaid decision, the appellants have preferred this appeal on the following five (5) grounds of complaint:

1. *The Honourable High Court Judge erred in law and fact by holding that there was no spousal consent while it was produced and there has never been any complaint from the wife who gave her consent and she was not a party to the suit.*
2. *The Honourable High Court Judge erred in iaw and fact by holding that the consent tendered by the 2nd Defendant was uncertain, generic and was not issued generally.*
3. *The Honourable High Court Judge erred in iaw and fact by making findings basing on facts which are not supported by pleadings.*

4. *The Honourable High Court Judge erred in law and fact by concluding that the loan was discharged basing on mere allegations from a stranger with no any proof.*
5. *The Honourable High Court Judge erred in law and fact by assuming that even though there is no any proof to support the 1st defendant's allegation that the loan was taken by the Company, the time frame of the consent is evidence.*

Before us, when the appeal came up for the hearing, whilst Messrs. Lameck Merumba, learned Senior State Attorney, and Allan Mbuya, learned State Attorney, represented the 1st appellant, Mr. Innocent Felix Mushi, learned advocate, appeared for the 2nd and 3rd appellants. On the other hand, Messrs. Emmanuel John and Mr. Chama Augustine Matata, both learned advocates, represented the 1st and 2nd respondents respectively.

At the outset, before the hearing could commence, Mr. Merumba made an informal application praying for leave, pursuant to rule 111 of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), to amend the notice of appeal, memorandum of appeal and any other relevant parts of the record of appeal, by replacing the names of the 1st appellant, that is, Twiga Bancorp Limited and TPB Bank PLC, with the name Tanzania Commercial Bank PLC. He explained that just after the delivery of the impugned judgment and after the notice of appeal had been lodged, Twiga Bancorp merged with Tanzania Postal Bank PLC and adopted the

latter name. To substantiate it, Mr. Merumba produced the Public Notice by the Bank of Tanzania by which the said merger was authorized with effect from 17.05.2018. He further explained that on 14.04.2021, Tanzania Postal Bank PLC changed its name to Tanzania Commercial Bank PLC which should be the name indicated and appearing for the 1st appellant in the record of appeal. To that effect, a certificate of Change of Name No. 125056 from BRELA, was produced by Mr. Merumba.

Mr. Mushi supported the application as it was for Mr. Matata who had no objection for the amendments sought to be effected. Likewise, Mr. John had no qualms about the amendments sought and at this point, he prayed to withdraw the second set of the notice of preliminary objection he had earlier lodged on 29.08.2020 which, in essence, related to the complaint about the 1st appellant's names.

Having considered the unopposed application by the 1st appellant and for purposes of regularizing the record of appeal, we instantly granted it. We took cognizance of the 1st appellant's change of name firstly, from Twiga Bancorp Limited to Tanzania Postal Bank PLC and lastly from Tanzania Postal Bank PLC to the current name of Tanzania Commercial Bank PLC. Accordingly, pursuant to rule 111 of the Rules, we ordered that the name of the 1st appellant be amended to read as

Tanzania Commercial Bank PLC whenever it appears in the memorandum and record of appeal.

Apart from the above and before dealing with the substance of the appeal, we also had to deal with a preliminary objection raised by the 1st respondent to the effect that the appeal is time barred because it is anchored on an invalid certificate of delay.

Addressing us on the above point of preliminary objection, Mr. John argued that the certificate of delay appearing at page 306 of the record of appeal is invalid for excluding the period up to 06.04.2020 and not 24.03.2020 which is the date the appellants were supplied with the copy of the proceedings they had requested for appeal purposes. He referred us to a letter by the appellants' advocate to the Deputy Registrar appearing at page 303 of the record of appeal in which it is admitted that the copy of the proceedings in respect of Land Case No. 46 of 2015 was received by the appellants on 24.03.2020. Mr. John pointed out that the remark in the letter that the proceedings and the drawn order in respect of the application for leave had not been supplied is of no significance because the said proceedings and such documents are not envisaged under rule 90 (1) of the Rules. Relying on **Kantibhai M. Patel v. Dahyabhai F. Mistry** [2003] TLR. 437, Mr. John contended that the error in the certificate of delay in question,

renders it invalid. He also argued that if the delay to file the appeal was caused by the fact that the appellants had to wait for the proceedings and drawn order in respect of the application for leave, then the appellant ought to have applied for extension of time within which to file the appeal. He also complained that apart from the said invalid certificate of delay appearing at page 306 of the record of appeal, there is also another certificate of delay appearing at page 300 of the record of appeal. It was Mr. John's argument that the two certificates of delay cannot co-exist.

Mr. John further submitted that since the appellants cannot take the advantage of the exclusion of time within which the appeal ought to have been filed and as the copy of the proceedings was supplied to them on 24.03.2020, then the appeal ought to have been filed within 60 days, that is, not later than 25.05.2020. He concluded by submitting that the appeal which was filed on 01.06.2020 was filed out of time. He thus prayed for the dismissal of the appeal with costs.

Mr. Matata for the 2nd respondent, associated himself with the submission made by Mr. John. He insisted that the appeal was filed beyond the period of 60 days as required by rule 90 (1) and that the same should be dismissed.

On his part, Mr. Merumba for the 1st appellant, opposed the preliminary objection. He contended that the objection is misconceived and devoid of merit because the certificate of delay in question is not invalid. He pointed out that having duly lodged the notice of appeal and applied for the copy of the proceedings for appeal purpose, the appellants duly applied for leave to appeal. As the requested copy of the proceedings was not supplied in time, the appellants had to remind the Deputy Registrar by sending him a number of reminder letters. Even when the copy of the proceedings was supplied to the appellant on 24.03.2020, still there were other relevant documents relating to the application for leave which were omitted. Mr. Merumba further argued that according to the letter by the Deputy Registrar appearing at page 305 of the record of appeal, the complete copy of the proceedings was ready for collection on 06.04.2020. He thus contended that the certificate of delay which excluded the period from 02.11.2017 when the copy of the proceedings was requested to 06.04.2020 when the requested copy was ready for collection, cannot be invalid. Mr. Merumba did therefore submit that the appeal which was filed on 01.06.2020 is not time barred.

Mr. Merumba further submitted that, in terms of rule 96 (1) of the Rules, the documents relating to the application for leave were necessary documents without which, the appellants could not have

lodged a competent appeal to this Court. He lastly contended that the first certificate of delay issued on 11.11.2019 was issued in disregard of the documents relating to the application for leave which were yet to be supplied to the appellants. He thus argued that as the said first certificate was invalid and in the presence of the valid second certificate which was issued on 06.04.2020, the first certificate became automatically ineffective and inoperative. To cement his argument on this point, Mr. Merumba referred us to the decision of the Court in **Simbo Yona Laban Nkya v. David Sewa and Two Others,** Civil Appeal No. 42 of 2018 (unreported).

Mr. Mushi, learned advocate for the 2nd and 3rd appellants, concurred with Mr. Merumba that the certificate of delay in question is proper and valid and further that the appeal is not time barred.

In his rejoinder, Mr. John stuck to his guns. He reiterated his position that the certificate of delay in question is invalid because the appellants were supplied with complete record for appeal purpose on 24.03.2020 and not 06.04.2020. He also insisted that the copy of proceedings referred to under rule 90 (1) does not include the proceedings and documents relating to applications for leave to appeal.

Having heard and considered the arguments from the counsel for the parties on the preliminary point of objection raised by the 1st

appellant, we are now in position to confront and determine it. Basically, the issue before us is whether the certificate of delay issued by the Deputy Registrar on 06.04.2020, appearing at page 306 of the record of appeal, is invalid rendering the appeal time barred.

According to the record of appeal, after the delivery of the impugned decision on 30.10.2017, the appellants applied for a copy of the proceedings for appeal purpose and duly lodged the notice of appeal on 02.11.2017 and 03.11.2017 respectively. Thereafter, the appellants applied for leave to appeal which was granted on 27.04.2018. It is also on record that, as the requested copy of the proceedings was not supplied in time, the appellants sent reminder letters to the Deputy Registrar on 12.03.2018, 16.11.2018, 13.06.2019 and lastly on 16.09.2019. On 11.11.2019, the Deputy Registrar responded to the reminder letters by notifying the appellants that the requested copy of the proceedings was ready for collection. On the same date, that is, 11.11.2019, the first certificate of delay appearing at page 300 of the record of appeal, was issued excluding the period from 02.11.2017 when the copy of the proceedings was requested to 11.11. 2019 when the appellants were notified that the copy of the proceedings was ready for collection. It happened that the copy of the proceedings which was ready for collection on 11.11.2019, contained some uncertified documents and further that it had omitted a copy of the proceedings

and drawn order relating to the application for leave to appeal. That being the situation, on 04.12.2019, by a letter appearing at page 301 of the record of appeal, the appellants requested the Deputy Registrar not only to supply them with the certified proceedings, the omitted documents and the drawn order but most importantly to be issued with a new certificate of delay.

Additionally, at page 303 of the record of appeal, there is a reminder letter by the appellants dated 25.03.2020 reminding the Deputy Registrar to supply the appellants with the complete copy of the proceedings including those relating to the application for leave to appeal and the new certificate of delay. It should be pointed out that it is in that letter that the appellants acknowledged that they had received some uncertified documents and incomplete copy of the proceedings on 24.03.2020. It is on this acknowledgment by the appellants, that Mr. John for the 1st appellant, has capitalized on and based his point of preliminary objection that the second certificate of delay is invalid because the date indicated therein as the date when the appellants were notified that the requested copy of the proceedings was ready for collection is 06.04.2020 and not 24.03.2020 as acknowledged by the appellants.

In response to the appellants' reminder letter dated 25.03.2020, the Deputy Registrar, through his letter appearing at page 305 of the record of appeal, dated 06.04.2020, notified the appellants that the complete copy of the proceeding was ready for collection and that is when the new second certificate of delay was accordingly issued. In the said second certificate of delay appearing at page 306 of the record of appeal, the period excluded was from 02.11.2017 when the request for the copy of the proceedings was made to 06.04.2020 when the appellants were notified that the requested copy of the proceedings was ready for collection.

From the above detailed chronological account of events, beginning from when the impugned decision was rendered to the point when the second certificate of delay was issued, it cannot be said that the certificate of delay in question is invalid. As we have demonstrated above, the certificate of delay in question properly and correctly excluded the period from 02.11.2017 when the copy of the proceedings was requested to 06.04.2020 when the appellants were notified of the readiness of the complete copy of the proceedings for collection. In form and substance, the certificate of delay in question, is in compliance with rule 90 (2) of the Rules.

Since the certificate of delay was valid and proper, the appellants were thus entitled to benefit from the period of exclusion as indicated in the certificate of delay in accordance with the proviso to rule 90 (1) of the Rules. Further, as the period was excluded up to 06.04.2020, the appeal which was filed on 01.06.2020 was filed within the period of sixty (60) days as required by the law.

As we have alluded to above, the impetus for the argument by Mr. John that the certificate of delay is invalid came from the concession by the appellants in their reminder letter appearing at page 303 of the record of appeal, that by 24.03.2020 the appellants were already in receipt of the copy of the proceedings. We note that, in that same letter the appellants put it very clear that the copy received was incomplete for, among other things, omitting the documents relating to the application for leave to appeal. Since in accordance with rule 96 (1) (i) of the Rules, the drawn order giving leave to appeal, is one of the essential documents to be contained in the record of appeal, without which, the appellants could not have filed a competent appeal, the argument by Mr. John that the appellants ought not to have waited for such a document to be supplied to them is, with respect, misconceived. It is our considered view that where leave to appeal is required, a copy of the proceedings referred to under the proviso to rule 90 (1) of the

Rules, includes the documents relating to an application for leave to appeal as listed under rule 96 (1) of the Rules.

Regarding the complaint on the existence of two certificates of delay in the record of appeal, it is our considered view that given the circumstances under which the said two certificates were issued, it cannot be said that the ailment is something that is not curable under rule 2 of the Rules. Since the first certificate of delay was issued while the appellants had not been supplied with a complete copy of the proceedings, the issuance of the said certificate of delay was pre-mature and rendered the certificate ineffective and redundant. Further, under the circumstances of this matter, the fact that the second certificate of delay was issued without the first one having been withdrawn first, does not render the second certificate of delay invalid. See – **Gedda Franco and Another v. Mohamed Rashid Juma,** Civil Appeal No. 59 of 2017 (unreported) and **Simbo Yona Laban Nkya** (supra).

For the above reasons, we find that the certificate of delay is valid and the appeal is not time barred. The preliminary objection is dismissed accordingly.

The dismissal of the preliminary objection takes us to the determination of the appeal on merits.

In support of the appeal, Mr. Merumba started by adopting the appellants' joint written submission earlier filed on 24.07.2020 in which the 1st and 2nd grounds of appeal were joined and conjunctively argued. It was submitted that, the High Court erred in holding that there was no spousal consent. In particular it was argued that the consent by Ms. Rukia Parves (exhibit D2) did not cover the Second Mortgage. It was further submitted that since it was not Ms. Rukia Parves who had complained, the High Court erred in finding that her consent was uncertain and generic. Additionally, it was argued that as it was not disputed that Rukia Parves is the wife of the 2nd respondent and that she had consented, there was no reason for the High Court to hold that the Second Mortgage lacked consent. It was further submitted that the evidence by the 2nd respondent was self-contradictory and that he had concealed material facts on his marital status. Finally, on the two grounds of appeal, it was insisted that the Mortgaged House was properly mortgaged in terms of section 144 (3) of the Land (Amendment) Act No. 2 of 2004 (the Land Act) and further that the same was lawfully sold to the 3rd appellant.

As on the 3rd and 4th grounds of appeal which were also combined and argued conjunctively, it was simply submitted that it was an error for the High Court to hold that the loan was discharged while there was no such evidence on the record.

Finally, on the 5th ground of appeal, it was argued that there was no proof that there was any loan advanced to Shabbirdin Co. Ltd as held by the High Court. It was also submitted that the High Court erroneously assumed that the time frame of the consent was sufficient evidence to prove that the consent had expired.

Mr. Mushi, learned advocate for the 2nd and 3rd appellants, joined hands with Mr. Merumba for the 1st appellant. He just prayed for the appellants' joint written submission to be adopted and considered.

In opposition, Mr. John, learned advocate for the 1st respondent, adopted his written submissions he had earlier filed on 25.08.2020. He then, without more, prayed for the Court to consider his written submissions and dismiss the appeal with costs.

In the written submissions by the 1st respondent, it is argued that from the evidence on record there were two different mortgages and loans both secured by the Mortgaged House. The First Mortgage which was in respect of the company known as Shabbirdin Co. Ltd was executed in 2004 whereas the Second Mortgage for the 2nd respondent was executed in 2013. It was further submitted that while there was no dispute that the First Mortgage was executed after obtaining the consent of the 2nd respondent's first wife Ms. Rukia Parves, the parties parted ways on whether the said consent by Ms. Rukia Parves extended to the

Second Mortgage as well. It was argued for the 1st respondent that, as rightly found by the High Court, the two loans and mortgages were different and independent to each other and further that the consent by Ms. Rukia Parves obtained in 2004 was for the First Mortgage and it never extended to the Second Mortgage which was executed 9 years later, that is, in 2013.

Regarding the complaint that it was Ms. Rukia Parves and not the 1st respondent who ought to have instituted the suit, it was argued for the 1st respondent that, since the 1st respondent was also the wife of the 2nd respondent and as she had interest in the Mortgaged House she had the right and cause of action over the mortgage and the sale of the Mortgaged House. It was insisted that in accordance with section 161 (1) and (2) of the Land Act and section 59 of the Law of Marriage Act, Cap 29 R.E.2002 (the LMA), for the house to be mortgaged her consent was required and ought to have been obtained.

As it was for the counsel for the appellants and the 1st respondent, Mr. Matata, learned advocate for the 2nd respondent, did also adopt his written submissions in reply which he had earlier filed on 26.08.2020. He responded to the appeal by amalgamating the five grounds of appeal into a single issue on whether the Second Mortgage obtained the necessary spousal consent. He submitted that according to the evidence

on record, the consent by Ms. Rukia Parves did not cover the loan advanced to the 2nd respondent (exhibit D4) in respect of the Second Mortgage. He referred us to page 203 of the record of appeal where the 1st appellant's loan officer, DW2, is on record telling the High Court that the consent related to the loan advanced to the company which was independent from the loan advanced to the 2nd respondent. He also referred us to the evidence given by DW1 (the 2nd respondent) which is in support of the finding that there were two different and independent loans and mortgages.

Mr. Matata argued further that even if we assume for the sake of argument that the Second Mortgage was also covered by the consent by Ms. Rukia Parves, still under section 114 (1) of the Land Act, read together with section 59 of the LMA, the mortgage lacked the consent from the 1st respondent who is also the wife of the 2nd respondent residing in the Mortgaged House. To concretize this argument Mr. Matata referred us to the testimony of DW2 which is to the effect that where there are more than one wife, consent from each of the wives is required. He insisted that the consent by Ms. Rukia Parves related to the First Mortgage in respect of the loan to the company and that the Second Mortgage for the 2nd respondent lacked spousal consent. He thus prayed for the dismissal of the appeal with costs as the High Court

did not err in nullifying the mortgage and the sale of the Mortgaged House.

Messrs. Merumba and Mushi for the appellants had nothing to rejoin.

On our part, having heard and considered the submissions made for and against the appeal and also having examined the five grounds of appeal and the whole record of appeal, we are of a considered view that the appellants' appeal and grievances against the High Court decision can sufficiently be determined by considering two issues: **One**, whether there were two different and independent financial arrangements or loans and mortgages over the Mortgaged House and **two**, whether the consent by Rukia Parves (exhibit D2) obtained in 2004 covered the financial arrangement or loan and the mortgage executed in 2013 which was secured by the same Mortgaged House.

Apart from the above issues, there is also another pertinent issue arising from the pleadings, particularly from the joint written statement of defence and also from the issues framed by the High Court and the evidence on record, concerning the validity of the sale of the Mortgaged House to the 3rd appellant which need to be attended in this appeal. The High Court having declared the mortgage invalid proceeded to also invalidate all transactions in relation to the Mortgaged House including

the sale of the said house to the 3rd appellant. The issue arising from the said decision and which has considerably exercised our mind is whether the 3rd appellant was not protected by the law for being a bona fide purchaser for value without notice. We are of a considered view that, to save the interests of fairness and for attaining the justice of this case, we are obliged to determine this issue too.

Regarding the first issue as posed above, there is no dispute and the evidence on record clearly show that the Mortgaged House was pledged as collateral first, for the loan advanced by the 1st appellant in 2004 and then for that loan which was advanced in 2013. The Mortgaged House was thus used as security for both two financial arrangements as it was also testified by the 2nd respondent, who is on record, at page 194 of the record of appeal, testifying that the two loans were secured by the same collateral. As to whether the two financial arrangements formed two different and independent loans and mortgages, we are in agreement with the counsel for the respondents that, based on the evidence on record, there were two different and independent loans and mortgages. There is evidence on abundance showing that the financial arrangement or the loan by the 1st appellant in 2004 was advanced to the company known as Shabbirdin and Co. Ltd. This loan is different to the loan which was advanced to the 2nd respondent in his name in 2013. This was firmly stated and conceded by

the 1st appellant's loan officer, Mr. Shomari Shaaban (DW2), who is on record at page 200 of the record of appeal testifying that, while the loan in 2004 was taken by Shabbirdin and Co. Ltd, the loan advanced in 2013 was in relation to the 2nd respondent and not the company. The fact that, there were two different and independent mortgages, is also evidenced by the Mortgage Deed appearing at page 57 of the record of appeal, whose contents were not disputed by any party. In that mortgage which was executed in 2013 the mortgagor is Mr. Parves Shabbirdin and not Shabbirdin Co and Ltd.

Based on the above observations, we agree with the counsel for the respondents that the findings by the High Court that there were two different and independent mortgages cannot be faulted. The loan and the First Mortgage executed in 2004 were in respect of the company, that is, Shabbirdin Co and Ltd while the loan and the Second Mortgage executed in 2013 were for the 2nd respondent in his personal name. Even though the 2nd respondent was one of the Directors and members of Shabbirdin Co and Ltd that fact could not have defeated the legal position that, in law, a company has its own distinct legal personality different from its individual members. This position is well settled that we need not cite any authority to concretize it.

Having found that there were two different and independent mortgages, that is, the First Mortgage executed in 2004 guaranteeing the loan issued to Shabbirdin Co. and Ltd and the Second Mortgage executed in 2013 for the loan advanced to the 2nd respondent, the following issue is on whether the consent by Ms. Rukia Parves obtained in 2004 for the First Mortgage extended to and covered the Second Mortgage. As we have alluded to earlier, in the instant matter, there was no dispute that the 1st respondent who is the second wife to the 2nd respondent, did not consent to the Second Mortgage executed to secure the loan taken by her husband, that is, the 2nd respondent, whose default led to the sale of the Mortgaged House. The fact that the Mortgaged House is a matrimonial home to which both the 1st respondent and Ms. Rukia Parves had interests was also not in dispute.

In their attempt to validate the Second Mortgage, the appellants maintained that the Second Mortgage had the consent of Ms. Rukia Parves who is the first wife to the 2nd respondent. On our part, as it was also found by the High Court, we find the defence by the appellants that the Second Mortgage was consented by Ms. Rukia Parves, very porous. Because the Second Mortgage was different and independent from the First Mortgage, there was no way the consent by Ms. Rukia Parves for the First Mortgage could have extended to cover the Second Mortgage. The Second Mortgage required a new spousal consent and since the 2nd

respondent had two wives who both had interests in the Mortgaged House, their respective consent ought to have been obtained as required by section 114 (1) (a) and (b) of the Land Act thus:

> *"114 (1) 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 is signed 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.*
> >
> > *(b) Any document used to grant the mortgage is signed by or there is evidence that it has been assented by the mortgagor and the spouse or spouses living in that matrimonial home".*

Guided by the above position of the law, we have no hesitation in agreeing with the High Court that the Second Mortgage from which the sale of the Mortgaged House resulted lacked the required spousal consent. As on the causation of the ailment, the appellants pinned the blame on the 2nd respondent for concealing material facts regarding his marital status when the mortgage was being executed. While we agree with the counsel for the appellants that the 2nd respondent had the

obligation to disclose to the 1st appellant his marital status and that he thus contributed to the ailment of the mortgage, we however, find that the 1st appellant is equally blameworthy. In the case of **National Bank of Commerce Limited v. Nurbano Abdallah Mulla,** Civil Appeal No. 283 of 2017 (unreported), a consent of a spouse over the mortgaged property was obtained for the first facility of Tshs. 100,000,000/=. However, on the second overdraft facility of Tshs. 500,000,000/= when the same property was mortgaged, no consent was sought and obtained. In that case, the Court, apart from stating that the second overdraft facility required a new consent, also stated that the obligation of the mortgagee before finalizing the loan issuance procedure, was to take reasonable steps to ascertain whether the application for the mortgage has the spousal consent as required by the law. It was also stated that the obligation is not cast upon the mortgagee only but also upon the mortgagor who has a reciprocal duty to disclose that he has the consent of his spouse or spouses as the case may be.

The lack of the required spousal consent for the Second Mortgage was in contravention of the mandatory requirement under section 114 of the Land Act as well as section 59 (1) of the LMA. The finding by the High Court that the Second Mortgage was invalid for lacking consent from the 2nd respondent's spouses, can therefore, not be faulted. The

law is settled, a mortgage of a matrimonial home without a spousal consent is invalid.

Having concurred with the High Court's finding and declaration that the Second Mortgage was invalid, the following and last issue, as we have pointed out earlier, is whether, under the circumstances of this case, the declaration that the mortgage is invalid necessarily rendered the sale of the Mortgaged House invalid. As alluded to earlier, the question for our determination is whether, in consideration of the circumstances of this case, the 3rd appellant is not a bona fide purchaser for value without notice who is protected by the law.

Our examination of the record reveal that the claim by the appellants that the 3rd appellant might have been a bona fide purchaser for value was raised at the earliest stage in the pleadings. In paragraphs 5, 6 and 8 of the appellants' joint written statement of defence, it was stated by the appellants that the Mortgaged House was lawfully purchased by the 3rd appellant. The appellants contended further that, the Mortgaged House was sold to the 3rd appellant at the public auction, that a certificate of sale had been issued and also that the Mortgaged House is registered in the 3rd appellant's name. In the same light, the second issue as framed by the High Court had a bearing on the issue of the 3rd appellants being a bona fide purchaser for value.

The issue reads thus; whether the sale of the property, that is, the Mortgaged House, to the 4th defendant (now 3rd appellant) was lawful. To our view, this issue intended to address the claim by the 3rd appellant that he was a bona fide purchaser for value without notice.

It is also on record that in their respective evidence, the parties led evidence relevant to the issue. At page 189 of the record of appeal, the 1st respondent (PW1) is on record admitting that she knew that the Mortgaged House had been sold to the 3rd appellant. Further, at page 193 of the record of appeal, the 2nd respondent (DW1) testified that according to the Government records, the property is registered in the name of Mr. Mmbando, that is, the 3rd appellant. The 1st appellant's witness (DW2) did also tell the High Court that the Mortgaged House was lawfully sold at public auction to the 3rd appellant. A certificate of sale to that effect was tendered by him in evidence as exhibit D3. In his testimony, the 3rd appellant (DW3) told the High Court how it came to his knowledge through the notice in Habari Leo newspaper that the Mortgaged House was on sale. He then participated in the public auction and ended up to being declared the highest bidder. The 3rd appellant tendered a certificate of title in evidence which was admitted as exhibit D5. Most importantly, and relevant to the question of him being a bona fide purchaser of value, the 3rd appellant, at page 205 of the record of appeal, prayed to be recognized a lawful buyer from the Bank, that is,

the 1st appellant. He also prayed for his rights to be protected because the sale of the Mortgaged House was in accordance with the law.

From what we have endeavoured to demonstrate above, it is clear that the 3rd appellant purchased the Mortgaged House in good faith without notice of any defect in title of the seller, it be actual or constructive. He had no reason to suspect any irregularity in the sale exercise. The 3rd appellant was thus a bona fide purchaser for value without notice and the High Court ought to have taken that fact into consideration before invalidating the sale of the Mortgaged House which had an effect of depriving the 3rd appellant of his title and rights over the Mortgaged House.

Because the 3rd appellant is a bona fide purchaser for value without notice, as demonstrated above, and there being no evidence of fraud or misrepresentation, his rights over the Mortgaged House is legally protected under section 135 (1), (2) and (3) of the Land Act, which provides that:

> *"135 (1) This section applies to;*
>
> *(a) A person who purchases mortgaged land from the mortgagee or receiver, excluding a case where the mortgagee is the purchaser.*
>
> *(b) N/A*

(2) A person to whom this section applies

(a) N/A

(b) N/A

(c) is not obliged to inquire whether there has been a default by the mortgagor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale has actual notice that there has been a default by the mortgagor, that a notice has not been duly served or that the sale is in some way unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which that person has actual or constructive notice".

The position of the law, that a bona fide purchaser for value without notice is protected is settled. In the case of **Peter Adam Mboweto v. Abdallah Kulala and Another** [1981] T.L.R. 335, a court decree was executed by sale of the judgment debtor's coconut shamba. On appeal, though the decree was reversed, the sale of the

shamba to the bona fide purchaser was not invalidated. Apart from holding that the bona fide purchaser is protected even where the decree is reversed, This Court stated the rationale behind the protection of a bona fide purchaser for value, thus:

> *"In the case of bona fide purchaser, the rule is that the sale will be upheld notwithstanding the reversal of the decree, because otherwise there will be less inducement to intending purchaser to buy at an auction sale and consequently less chance of the property fetching a proper value at such sales. Another reason is that a purchaser cannot be expected to go behind the judgment to inquire into the irregularities in the suit".*

See also – **Juma Jaffer Juma v. Manager of the Peoples' Bank of Zanzibar Ltd and Two Others** [2004] T.L.R. 332, **Omari Yusuph v. Rahma Ahmed Abdulkadir** [1987] T.L.R. 169 and **Godebertha Lukanga v. CRDB Bank Ltd and Others,** Civil Appeal No. 25 of 2017 (unreported).

Guided by the above stated position of the law, we find that under the circumstances of this case where the Mortgaged House was lawfully sold to the 3rd appellant as a bona fide purchaser for value without notice, the invalidation of the mortgage for want of spousal consent could not have necessarily rendered the sale of the Mortgaged House

invalid. The invalidation of the sale had the effect of affecting the 3rd appellant, a bona fide purchaser, whose title to the Mortgaged House is protected under the law. The High Court did thus err in invalidating the sale of the Mortgaged House.

Having found that the sale of the Mortgaged House cannot be declared invalid despite the invalidation of the mortgage, the question that arises is what remedy is the 1st respondent entitled to. The 1st respondent who undoubtedly, is prejudiced by the validation of the sale of the Mortgaged House has a remedy under section 134 (4) of the Land Act which provides that:

> *"A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power".*

Given the above stated position of the law, the 1st respondent has a remedy in damages, and in the instance case, it is against the 1st appellant and 2nd respondent who, as we have found above, equally contributed to the ailment of the mortgage and to the resultant sale of the Mortgaged House. Since, in the instant case, we have no sufficient material evidence upon which we can base an award for damages in favour of the 1st respondent, we leave it to the 1st respondent who is at liberty to institute a fresh suit for damages, if she so wishes, against the

said 1st appellant and 2nd respondent. It is in that suit where the 1st respondent will be able to prove the damages she has suffered and where the court will properly assess the quantum of damages the 1st respondent is entitled to.

In the event and for the foregoing reasons, the appeal is partly allowed in the manner stated above. Each party to bear its own costs.

DATED at **DAR ES SALAAM** this 30th day of October, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 7th day of November, 2023 in the absence of the appellants and in the presence of Mr. Emmanuel John, learned counsel for the 1st respondent and Mr. Chama Matata, learned counsel for the 2nd respondent via video link from High Court of Mwanza, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL