IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: SEHEL, J.A., KEREFU, J.A. And MLACHA, J.A.)

CIVIL APPEAL NO. 304 OF 2019

CATHERINE HONORATI..... APPELLANT

VERSUS

CRDB BANK .....1ST RESPONDENT

METHOD KAUNGA MORIS.....2ND RESPONDENT

HONORATI BIASHARA JOHN LYOMBE.....3RD RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania Land Division at Moshi)

(Mwingwa, J.)

dated 16th day of December, 2015

in

Land Case No. 15 of 2011

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JUDGMENT OF THE COURT

4th & 15th December, 2023

MLACHA, J.A.:

This appeal is against the decision of the High Court of Tanzania at Moshi in Land Case No. 15 of 2011. In that case, the appellant, Catherine Honorati, was the plaintiff. The respondents, CRBD Bank, Method Kaunga Moris and Honorati Biashara John Lyombe were the first, second and third defendants, respectively. We shall hereinafter refer to

them as first, second and third respondents, respectively or simply through their names wherever possible.

It was the appellant's case that she was married by Honorati Biashara John Lyombe on 11/3/1989 at Kirua Roman Catholic parish Moshi. During the subsistence of their marriage, they were blessed with five issues. That, sometimes in 1996, their father in law, John Makereme, bought a house from National Housing Corporation (the NHC) situated at Plot No. 127, Block L, section II, Moshi Municipality and gave it to them as their matrimonial home. The house was registered in the name of Honorati John Kilawe in 2006. They lived in the house peacefully, but later in the year 2010, her husband left and went to live at unknown place. She continued to live in the said house with her children until 16/6/2011 when she was served with a 14 days' notice from the first respondent informing her that the house could be sold because the second and third respondent had defaulted repayment of a loan. On making follow up, she noted that the house had been mortgaged by the third respondent to the first respondent on 4/2/2010 to secure a loan in favour of the second respondent. It came to her

knowledge that there was an outstanding amount of TZS 47,415,017.38 based on which the first respondent had a plan to sell the house. In an effort to resist the sale, she moved to file the case alleging that her consent as a wife was not obtained before mortgaging the house as provided under section 161 (3) of the Land Act, Cap 113, R.E. 2019.

It was the defence of the first respondent that the house was properly mortgaged because it is not a matrimonial property. That, since the mortgagor, Honorati John Kilawe, had no wife, there was no need for obtaining the spouse consent. She attached an affidavit of the said Honorati John Kilawe where he deposed that he had no wife.

Third respondent agreed that the house was mortgaged to the first defendant to secure a loan in favour of the second respondent but stated that he was merely requested to sign the documents without knowing the details. The second respondent neither filed a defence nor entered appearance. As time went on, the third defendant disappeared as well. Given the continual absence of the second and third respondents, the trial court granted a prayer to proceed with hearing of the suit *exparte* against the second and third respondents. The appellant

gave evidence and called 2 witnesses to support her case. The first respondent called one witness.

Five issues framed by the trial court for its determination, were;

1. *Whether the plaintiff is married to the third defendant.*
2. *Whether the suit land was matrimonial home.*
3. *Whether consent of the plaintiff was required to mortgage the property.*
4. *Whether the defendant exercised due diligence in accepting to mortgage the property.*
5. *What reliefs are the parties entitled to.*

Having heard the evidence from both sides, the trial court was persuaded with the marriage certificate, exhibit P1, and held that the appellant was married to the third respondent. It thus answered the first issue in the positive. Nevertheless, having noted that the title deed, exhibit P2, was registered in the name of Honorati John Kilawe, who was not a party to the suit, the trial court held that the third respondent and Honorati John Kilawe were not one and the same person. It therefore answered the second issue in negative.

For the fourth issue, the trial court observed that, the first respondent visited the disputed property and asked neigbours concerning the mortgagor, it was held that the first respondent exercised due diligence in accepting the mortgage. The issue was answered in the negative. Accordingly, it dismissed the suit as observed above.

The memorandum of appeal has 9 grounds. There were also two additional grounds making a total of 11 grounds of appeal. The grounds of appeal contained in the original memorandum of appeal read as follows:

1. *That, the trial judge erred in law and fact to hold that the appellant failed to prove her case over the disputed area while the evidence showed that the appellant is the real spouse of the 3rd respondent.*
2. *That, the trial judge contradicted himself when he rightly held, while deciding the first issue, that the 3rd respondent was married to the appellant (plaintiff) but went on to rule out while deciding the third issue, that the appellant and the third respondent were not married.*
3. *That, the trial judge erred to hold that there was no evidence that showed that Honorati John Kilawe and Honorati Biashara John Lyombe are one and the same person, a fact which was admitted*

by the 3rd respondent in his defense and he ignored the evidence given by plaintiff's witnesses including her children and the ten cell leader all who testified that the 3rd respondent is the husband of the appellant and used the name of Honorati John Kilawe together with that of Honorati John Biashara Lyombe interchangeably.

4. *The trial judge erred to ignore the fact that the 1st defendant did not conduct a thorough due diligence over the suit premises despite the fact that there was a marriage certificate that was attached to the mortgage agreement showing that the third respondent (also known as Honorati John Kilawe) was a married person and thus the spousal consent was required.*
5. *That, the trial judge erred to believe the evidence of the 1st respondent (1st defendant) book, line and sinker that due diligence was conducted while the 1st respondent did not provide any proof evidencing the same which would have included the evidence from the leadership of the street (Mtaa) where the disputed house is located together with the names of the people that told it that Honorati John Kilawe was not married and that the said house belonged to him alone.*
6. *That, the trial judge erred in law and fact to rely on the purported affidavit of Honorati John Kilawe which lacked the jurat of attestation as required by the law.*

7. *That, the trial judge erred in law and fact to rely on the purported affidavit of Honorati John Kilawe whose jurat of attestation was fatally defective for lack of disclosure of the name of the person who swore it, the place where it was sworn, the date unto which it sworn and whether the magistrate who attested the same knew the deponent or that the deponent was identified to him by another person.*

8. *That, the trial judge erred in law to hold that despite the fact that 3rd respondent (defendant) admitted in his defence that he mortgaged the matrimonial house and was married to the appellant, the 3rd defendant was supposed to come and testify in court ignoring the fact that the 3rd respondent was not the appellant's witness, the appellant was not duty bound to make him testify on her behalf; that the 3rd respondent absented himself after filing his defence; and that the Court was duty bound to make requisite orders against him including evaluating his defense.*

9. *That, the trial judge erred in law and fact not to hold that the 3rd respondent mortgaged the matrimonial home without seeking and obtaining spousal consent of the appellant and thus the purported mortgage between him (Honorati John Kilawe also known as Honorati John Kilawe) to the 1st respondent was null and void.*

The two additional grounds read as under:

1. *The trial court being a Land Court, erred in law by hearing and deciding Land Case No. 15 of 2011 without the aid of two assessors contrary to rule 5 (f) of the High Court Registries (Amendment) Rules 2001 GN. 63 of 2001 as amended by the High Court Registries (Amendment) Rules 2005 GN. No. 364 of 2005.*
2. *The trial court erred in law when it failed to pronounce default judgment in favour of the appellant considering that all three respondents did not file Written Statement of Defence to the plaint filed on 15th October, 2005 as per court order dated 8th October, 2015.*

At the hearing of the appeal, Dr. Chacha Murungu, learned advocate, holding brief of Dr. Rugemeleza Nshala, learned advocate, appeared for the appellant with full instruction to proceed with the hearing. The first respondent was represented by Mr. Mathias Samwel, learned advocate. The second and third respondents were absent despite being served with notice of hearing through publication. Therefore the hearing of the appeal proceeded in their absence in terms of rule 102 (2) of The Tanzania Court of Appeal Rules, 2009.

When Dr. Murungu was invited to make his submission, he prayed to drop the first additional ground of appeal and argued the second

additional ground of appeal as the main ground. Making reference to page 105 of the record of appeal, Dr. Murungu submitted that the appellant prayed to amend the plaint which prayer was granted after there was no objection from the other side. It was ordered that the amended plaint be filed on or before 15/10/2015. He submitted that, on 22/10/2015, when the case was called for mention, Mr. Sandi, counsel for the first respondent, acknowledged to have been served with the amended plaint but prayed to adopt the written statement of defence (WDS) which was filed prior to the amendments. It was his submission that it was wrong for the trial court to proceed to hear the case in the absence of an amended WSD from the respondents. He contended that, following the prayer to amend the plaint which was granted by the court, the respondents were supposed to file amended WSD but they did not file it. He challenged the procedure used by the trial court to allow the first respondent to adopt her earlier WSD as an illegal procedure. Making reference to the case of **Airtel Tanzania Limited v. Ose Power Salutions Limited**, Civil Appeal No. 206 of 2017 (unreported), the counsel submitted that, since there was no amended WSD to the

amended plaint, the trial court was supposed to act under Order VIII rule 14 of the Civil Procedure Code Cap. 33 R.E. 2017 (the CPC) and pronounce default judgment. He urged the Court to invoke section 4 (2) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2019 (the AJA) and quash the trial court's proceedings from 22/10/2015 onwards, nullify the judgment, set aside the decree of the trial court, and step into the shoes of the trial court to pronounce the default judgment. To cement his prayer, he cited to us the case of **Joe R.M. Rugarabamu v. Tanzania Tea Blenders Limited** (1990) T.L.R. 24. For the remaining grounds which were agued in the alternative, the learned counsel adopted his written submission to form part of his oral submission.

Reading through the written submissions, we could find a submission on grounds 1, 2, 3, 4, 5, 7, 8, and 9 argued conjunctively. No submission was made on ground number 6. Counsel submitted that proof that the appellant was married by the third respondent is evidenced by a marriage certificate which has the name Honorati Biashara John Lyombe. He went on to submit that it was necessary to obtain the consent of the appellant because there was evidence that she

was married by the third respondent. This fact is also admitted by the third respondent in his WSD, he submitted. He proceeded to submit that there was evidence from PW1, PW2 and PW3 showing that the appellant and the third respondent lived in the house. It was also part of his submission that the names were used by the third respondent interchangeably. He went ahead and said that what was done by the first respondent contradict section 114 (1) (a) and (b) of The Land Act, Cap 113 and Land Form No.42 of the Land (Mortgage) Regulations on matrimonial home. He added that, the trial judge did not consider the point that there was no due diligence on the part of the first respondent. For the seventh ground of appeal, the counsel for the appellant submitted that, the affidavit which supported the mortgage transaction contained lies and had a defective verification clause.

The reply of the counsel for the first respondent on the additional ground was short. That, the first respondent supported the order made by the trial court that the WSD filed earlier on, before the amended plaint is adopted. He argued that, since the amendment was minor as it did not change the claim of the appellant, it was correct for the trial

court to allow the first respondent to adopt her earlier filed WSD. The learned counsel did not see the base for granting a default judgment.

Submitting on grounds one and two, Mr. Samwel argued that the appellant failed to prove that the loan was taken by the third respondent, a person not known to the first respondent. He pointed out that, the mortgage does not bear the name of the third respondent but the name of Honorati John Kilawe. In that regard, he supported the finding of the trial court found at page 128 of the record of appeal that, the appellant is not the wife of Honorati John Kilawe. He further pointed out that Honorati John Kilawe filed an affidavit showing that he is not married. That the first respondent conducted due diligence where it was established that Honorati John Kilawe had no wife. Subsequently, a loan was issued to the second respondent and secured by the third respondent's mortgage.

Submitting on grounds three and four, the counsel for the first respondent argued that, throughout the loan transactions there was no problem of names because the name of the mortgagor was exactly the same as reflected in the title deed. He added that the certificate of

marriage attached to the plaint and admitted in evidence as exhibit P1 was not part of the mortgage deed.

On ground five, the counsel for the first respondent referred the Court to the case of **Hadija Issa Arerary v. Tanzania Postal Bank**, Civil Appeal No. 135 of 2017 (unreported) on the duties of the Bank and submitted that, if the mortgagor is not married, the first respondent will demand an affidavit showing he is not married. Upon being satisfied through affidavit that he has no wife, the first respondent can proceed with loan transactions. At the end, the learned counsel urged the Court to uphold the decision of the trial court and dismiss the appeal.

In rejoinder, Dr. Murungu submitted that the affidavit contradicts with the marriage certificate and thus it has no legal effect. He further argued that the said affidavit is defective because its verification clause does not show the deponent and the person who identified the deponent. The counsel for the appellant also submitted that the defect on the affidavit proves that the first respondent did not do a proper due diligence. He added that if serious efforts were made, even by a simple inquiry at the local government, the firs respondent would have realized

that Honorati John Kilawe, the mortgagor had a wife. When probed by the Court as to why the appellant did not object for exhbit P1 to be admitted in evidence, counsel decided to leave it to the Court.

Having closely read the record of appeal, considered the grounds of appeal and heard the submission of the parties, both oral and written, the issue for our determination is whether the appeal has any merit.

We shall start by the additional ground of appeal by making reference to a book by **Mulla on The Indian Code of Civil Procedure,** 19th Edition at page 1794, where it reads:

> *"In respect of amendment of pleadings, the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such a manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question of controversy between the parties".*

The above is mirrored in our Order VI Rule 17 of the CPC, that, the Court, at any stage of the proceedings, can allow either party to alter or

amend his pleadings to enable the court to determine the real question in controversy.

The learned author went on to say:

> *"It is well-settled that, an amendment of plaint and amendment of written statements are not necessarily governed by exactly the same principle."*

The plaintiff having been permitted to amend the plaint, the defendant is also entitled to amend the WSD but the scope of amending the WSD is limited to the amended pleading introduced in the plaint.

The Court had in several occasions discussed the question of amendment of pleadings. It did so in the cases of **Morogoro Hunting Safaris Limited v. Halima Mohamed Manuya**, Civil Appeal No. 117 of 2011, **General Manager African Barrick Gold Mine Ltd v. Chacha Kigua & 5 Others**, Civil Appeal No. 50 of 2017, **Peter Wegesa Chacha Timasi & 2 Others**, Civil Appeal No. 49 of 2020 and **Airtel Tanzania Limited v. Ose Power Solutions**

Limited, Civil Appeal No. 206 of 2017 (All unreported). In **Airtel Tanzania Limited** (supra) we said the following:

> *"Indeed, as rightly propounded by the respondent's counsel, and seen from the cases referred to above, the settled position is that upon filing an amended plaint, the original plaint ceases to exist. The same when an amended WSD is filed inferring the end of the original WSD".*

In the present appeal, we reiterate the same position that after the appellant had amended her plaint on 15/10/2015, the original plaint filed on 9/8/2011 ceased to exist. The cessation did not extend to the first respondent's pleading because there was no amended WSD filed. The amendment made by the appellant was in respect of her plaint. Further, we gathered from the record of appeal that the amendment of the plaint was in respect of correcting the heading of the plaint, instead of reading "High Court" it read "Land Division". Also it geared at inserting exact amount in the paragraph conferring jurisdiction to the High Court. Essentially, it was more of a correction of some typos in the plaint which did not alter the claim of the appellant. That being the case, we find that

the trial judge was correct in allowing the first respondent to adopt the WSD because it was not affected by the amendments. The additional ground is thus found without merit and dismissed.

We shall now move to consider the first, second, third, fourth, fifth, eighth and ninth grounds which were argued collectively by the learned counsel for the appellant. These grounds of appeal raise critical issues whether what was done by the trial court rejecting the appellant's claim on differences of names was correct.

At paragraph 5 of the amended plaint, the appellant claimed that the third respondent was her husband following their celebrated wedding on 11/3/1989. She further claimed at para 10 of the amended plaint that the third respondent is the same as Honorati John Kilawe. To establish her claim, she testified before the trial court as PW1. Her evidence is found at pages 107 to 113 of the record of appeal. At page 107 of the same record, she said that she was married by Honorati John Lyombe Kilawe in 1989. She tendered a marriage certificate and it was admitted in evidence as exhibit P1. This exhibit shows that PW1 was married to Honorati Biashara John Lyombe. At page 111 of the same record, PW1

said that the proper name of her husband is Honorati Biashara John Lyombe. PW1 further tendered the certificate of title which was also admitted in evidence as exhibit P2. The appellant further called Merkior Alfred Mlingi (PW2), the ten cell leader of the area where PW1 was residing, and Patrick Honorati Kilawe, her son. Both testified that the third respondent was also known by the name of Honorati John Kilawe.

The learned counsel for the appellant argued that the evidence on record contradicts what was said by the trial court. With profound respect to the submission of the counsel for the appellant, the name Honorati Biashara John Lyombe is not the same as Honorati John Kilawe which appears in the mortgage deed. This fact is also admitted by the appellant as when she was cross examined by the counsel for the first respondent, at page 111 of the record of appeal, she said that the guarantor to CRDB loan is Honorati John Kilawe.

In the case of **Joseph F. Mbwiliza v. Kobwa Mohamed Lyeselo Msukuma (Legal Representative/ Administratrix of the Estate of the Late Rashid Mohamed Lyeselo) and Another**, Civil

Appeal No. 227 of 2019 30 (Unreported), The Court was faced with a similar scenario and said that:

> *"Worth noting, is the fact that, any* ***oral agreement*** *between the parties if they ever existed,* ***could not override the written agreement*** *where there is nothing to show the terms had been amended by the parties".*

The Court went on to state that:

> *"... once parties to a contract reduce their agreement into writing, the written agreement prevails in terms of section 101 of the Tanzania Evidence Act, Cap 6 R.E 2019 (the Evidence Act). This principle was restated by the Court in the case of Lufu Victor Kayombo (supra) stating that: Documentary evidence reflected repositories and memorial of truth as agreed between the parties and retained the sanctity of their understanding".*

In the present appeal, marriage certificate which is the basis of the relation between the appellant and the third respondent has the names of Honorati Biashara John Lyombe, whereas, the mortgage deed has the names of Honorati John Kilawe. Obviously, these are two different

names. These two names appearing in two different documents, cannot be overridden by the oral account of PW1, PW2 and PW3. We therefore find that the trial court correctly held that Honorati John Kilawe is not the same as Honorati Biashara John Lyombe. Further, we have noted that the title deed was issued on 17/8/2006, prior to the issuance of the loan in 2010 and its subsequent mortgage deed executed on 4/2/2010. As such we see no evidence of collusion or fraud.

In the end we concur with the trial court that the appellant failed to establish her connection to the title deed and the name indicated therein. She failed to prove her case. Accordingly, we find that the first, second, third, fourth, fifth, eighth and ninth grounds of appeal are baseless and we proceed to dismiss them.

Having found that the third respondent is not Honorati John Kilawe, we see no need to belabor on the seventh ground of appeal that challenges the validity of the affidavit as to do so it will be for academic purpose. We also observed that the appellant did not submit on the sixth ground of appeal of which we take that he has abandoned it.

All said and done, we find that the appeal is devoid of merit and is hereby dismissed. In circumstances of the present appeal, we make no order as to costs.

DATED at **MOSHI** this 15th day of December, 2023.

B. M. A. SEHEL
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 15th day of December, 2023 via Video Conference linked from High Court Moshi to Dar es Salaam, in the presence of Mr. John Karol Chogoro, learned advocate holding brief for Dr. Chacha Murungu, learned advocate for the appellant, Mr. Mathiya Samwel, learned advocate for the 1st respondent and absence of 2nd and 3rd respondents, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL