IN THE HIGH COURT OF TANZANIA
AT IRINGA

DC CIVIL APPEAL NO. 7 OF 2008

NATIONAL BANK OF COMMERCE LTD ..... APPELLANT

Versus

MNAYA CHALAMILA ..... RESPONDENT
(From the Decision of the District Court of Iringa in Original Civil Case No. 65 of 2001)

2nd & 12th May, 2014

JUDGMENT

MWAMBEGELE, J.:

By a Mortgage Deed executed on 03.05.1990 between the defunct National Bank of Commerce (henceforth "the appellant") and one Ramadhani Athumani Chalamila; husband of Mnaya Chalamila (henceforth "the respondent"), a loan facility of Tshs. 5,150,000/= was advanced to the mortgagor Ramadhan Athumani Chalamila. The loan was to be repaid in six years for twenty successive quarterly installments of Tshs. 257,500/=. A house standing on Plot No. 82 Block 1B Wilolesi area within the then township of Iringa (henceforth "the disputed property") was mortgaged to the appellant as security for the loan.

It happened that the borrower failed to repay the loan in time as per the Mortgage Deed. The appellant, acting under recourse provided for under

the Mortgage Deed, embarked upon steps to have the security auctioned by way of public auction with a view to recovering the outstanding amount of the loan. An announcement was made in the Majira Newspaper of 27.11.2001 that the house would be auctioned on 02.12.2001 at 4.00 pm. Feeling that the appellant course was wrongful and unlawful, the respondent filed a suit in the District Court of Iringa on 29.11.2001 praying for, *inter alia*, a declaration that the intended sale was unlawful and that the respondent enjoyed indefeasible rights over the suit house. The respondent won the case. The decision of the District Court aggrieved the appellant, hence this appeal. The appellant has filed three grounds of appeal; namely:-

1. The trial magistrate erred in law in holding that the appellant is permanently restrained from disposing of the mortgaged property;

2. The trial magistrate erred in law in holding that it is not mandatory for the spouse to register a caveat to protect the interest under section 59 of the Law of Marriage Act; and

3. The trial magistrate erred in law in holding that a court order is a condition precedent in order to conduct sale of a mortgaged property.

The appellant's appeal was first filed at Mbeya High Court District Registry as DC Civil Appeal No. 1 of 2003. However, after the establishment of the High Court District Registry at Iringa, it was transferred to this registry vide

an order of this court dated 19.12.2007. The transfer was made under Rule 7 (4) of the High Court Registries Rules – GN No. 164 of 1971 which provides that the Court may at any time on application or on its own motion transfer any proceedings from one Registry to another and any proceedings so transferred, and all documents shall be filed accordingly.

On 20.03.2014, this court granted the appellant's application to have this appeal argued *ex parte*. This course was taken having seen that the respondent had not been entering appearance for a long time then. Mr. Mushokorwa, learned Advocate who has been representing the respondent had withdrawn himself from representing the respondent since 28.09.2010. However, the record has it that on subsequent dates, Mr. Onesmo, learned Advocate has been appearing holding briefs for Mr. Mushokorwa for the respondent. Be that as it may, this appeal was argued *ex parte* before me on 02.05.2014. The appellant had the services of Mr. Rwazo, learned Advocate.

On the first ground Mr. Rwazo, learned Counsel for the appellant submitted that when the parties executed the Mortgage Deed between them the mortgagee advanced a loan facility to the mortgagor; the husband of the respondent. The disputed property was mortgaged as security. The mortgagor is now deceased. By the court restraining the Bank to sell the security the loan is still outstanding to date, he submitted. The learned Counsel submitted further that this court has, on several occasions, held that if loans are not repaid the economy of the nation will stagger and there will be no lending and borrowing. To buttress this proposition, the

learned Counsel referred me to ***Edward Nyelusye Vs The National Bank of Commerce (1997) Ltd Anor Civil Case No. 213 of 1988 HC (DSM)*** and ***Aida Kyenkungu V/s John Kyenlungu & 2 others*** Civil Case No. 57 of 2001 both unreported decisions of this court copies of which were supplied for easy reference. The learned Counsel went on to submit that by the trial magistrate holding that the Bank is permanently restrained from disposing of the mortgaged property, rendered the Bank to not recover its outstanding amount and if that order stands, the learned Counsel added, the outstanding amount will never be repaid.

On the second ground, the learned Counsel submitted that under the provisions of section 59 (1) of the Law of Marriage Act, Cap. 29 of the Revised Edition, 2002 (henceforth "the Law of Marriage Act") a spouse has interest capable of being protected by caveat. That caveat must be registered, he submitted. For this proposition, he cited the ***Kyenkungu*** case (supra), in which this court cited with approval the cases of ***Evelyne Magembe Cheyo Vs Furaha Finance Ltd and Anor*** Civil Case No. 15 of 2002 and ***Hadija Mnene V/s Ally Mbaga*** Civil Application No. 40 of 1995, both unreported decisions of this court. In all of these cases, the High Court was of the view that a prudent spouse would seek to protect that interest by registering a caveat. Subsection (1) of S. 59 of the Law of Marriage Act should not be read in isolation, he submitted. The learned Counsel also cited the decision of the Court of Appeal of ***Idda Mwakalindile Vs NBC Holding Corporation & Another*** Civil Appeal No. 59 of 2000 (unreported).

The learned Counsel submitted further that in the case at hand, the appellant did everything possible by conducting a search and there was no caveat registered and the Bank, having been satisfied that the property was true from any encumbrances, proceeded to advance the money to the respondent husband. If there was any caveat it ought to be registered with the Registrar of Titles, otherwise there would be no way of knowing the same. He thus submitted that the trial court erred in holding that it was not mandatory for the spouse to register a caveat.

On the third ground, the learned Counsel for the appellant submitted that the trial magistrate erred in holding that a court order is a condition precedent in order to conduct a sale of a mortgaged property. The powers to sale the mortgaged property are provided in the Mortgage Deed which is the agreement between the parties, he submitted. In this case the mortgaged properly was not auctioned but was advertised for sale and that that was an authority under clause 9(a) of the Mortgage Agreement which was tendered as Exh. D2 and confer in the appellant all the statutory powers including power to appoint a receiver and the power of sale. He submitted that at that time the appellant had all the powers in law to appoint a receiver manager and also the power of sale. Therefore the trial magistrate erred in holding that a court order was a condition precedent in order to conduct sale of mortgaged property, he stressed. The learned Counsel concluded his submissions by praying that the trial court's decision be set aside with an order that the appellant is at liberty to dispose of the mortgaged properly to recover the outstanding amount and that the appellant be paid its costs in this court and the court below.

I have subjected the submissions of the learned Counsel for the appellant to proper consideration it deserves. I entirely agree with his submissions. I have had an opportunity to deal with a case whose facts fall in all fours with the facts of the present case. This was ***CRDB & Another Vs Jenifa Barakael Lyimo*** Land Case Appeal No. 12 of 2007 (unreported). In that case, I referred to and relied on, *inter alia*, the authorities cited to me by the learned Counsel for the appellant and concurred and restated the position of the law as stated in those cases. I will reiterate my position in this case as I still hold the same position today.

I will start with dealing with the first and second grounds of appeal together. The remaining ground will be argued alone.

The starting point is the provisions of section 59 (1) of the Law of Marriage Act. These provisions read:

> "Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and **the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the**

time being in force relating to the registration of title to land or of deeds."
[Emphasis added].

The provisions of section 59 (1) of the Law of Marriage Act have been subject to discussion in a good number of cases in this jurisdiction. In all the cases, the court has not been mincing words: the spouse's interest as provided for by the subsection must be protected by registering a caveat. That has been the case law before the enactment of the present Land Act in 1999. That this is the position of the law was stated in the decision of the Court of Appeal in an unreported decision of the Court of Appeal of ***Mtumwa Rashid Vs Abdallah Iddi & Another*** Civil Appeal No.22 of 1993 in which it was stated:

> "Upon a true construction of this provision, we think that it applies only to cases where the matrimonial home is owned wholly by the spouse who is contemplating to alienate it ... if the matrimonial home is alienated without the consent of the other spouse, then the non consenting spouse shall be deemed to have an interest therein capable of being protected by caveat or caution ..."

The above quoted passage was followed by this court in the ***Evelyn Magembe Cheyo*** and the ***Hadija Mnene*** cases (supra). In ***Hadija Mnene***, *this* court [Lugakingira, J. (as he then was)] held:

> "A prudent spouse would seek to protect that interest by actually causing a caveat to be registered ... A bare interest in an estate would not operate to prevent its alienation where registered land is involved. It is therefore incorrect to think that the mere existence of S. 59 (1) is sufficient to protect an estate from being sold ... or mortgaged".

This position of the law was restated in **Joyce *Beda Mpinda Vs CRDB Bank Ltd & Others*** Comm. Case No. 67 of 2000 (unreported), ***Evelyn Magembe***, ***Aida Kyenkungu*** and ***Idda Mwakalindile*** (supra).

In the ***Joyce Beda Mpinda*** case this court [Bwana, J. (as he then was)] emphasizing on the need to have interest envisaged by the provisions of section 59 (1) registered, held:

> "... [the] interest has to be protected by a caveat. That caveat has to be registered with the Registrar of Titles otherwise the mortgagee has no other legal way to know of the same".

Like the facts of the case in ***Jennifer Barakael Lyimo*** (supra), the facts in ***Idda Mwakalindile*** (supra) are quite akin to the facts of the present case. In ***Idda Mwakaiindile***, like in the case at hand, a matrimonial house was mortgaged as security by a husband without the knowledge of a spouse. The mortgaged house, like in the present case, was in the sole names of the husband; the mortgagor. The husband obtained a loan from the National Bank of commerce but failed to repay the same as a result of which the mortgaged house was auctioned. The wife of the borrower sued the husband, the Bank and the buyer of the mortgaged house. The Court of Appeal, after quoting the provisions of section 59 (1) of the Law of Marriage Act, held:

> "Under this provision, it is beyond dispute that a matrimonial house owned by the wife or husband ought not be alienated by way of sale mortgage ... without the consent of the other spouse. ... the Bank was not aware that the house was a matrimonial property. It was not registered in the name of the [husband] ... For that reason, the Bank had no reason not to believe that the house belonged to the [husband]. ... The [spouse] had registrable interest in the house, which, as provided under this section, could be protected by a caveat." The court of Appeal went on: "... there being no caveat to protect the registrable interest of the

> [wife] ... there was no way in which the [Bank] ... could know that the house was a matrimonial property. ... The house as mortgaged, provided the security for the repayment of the loan ... the mortgaging and alienation of the house was not null and void in contravention of section 59 (1) of the Law of Marriage Act, 1971 ".

The foregoing position of the law was followed in an unreported decision of the Court of Appeal of ***NBC Holding Corporation Vs Agnes Masumbuko & 2 Others*** Civil Appeal No. 51 of 2000 whose facts were in all fours with ***Idda Mwakalindile*** in which the Court quoted the foregoing passage in ***Idda Mwakalindile***, as follows:

> "... it is beyond dispute that a matrimonial house owned by the wife or husband ought not to be alienated by way of sale, mortgage, lease or gift without the consent of the other spouse. In this case, as Mr. Mwakilasa, learned counsel submitted, the mortgagee, the bank, was not aware that the house was matrimonial property. It was registered in the name of the second respondent and not in the names of both the appellant and the second respondent. For that reason, the bank, the first respondent, had no reason to believe that the house belonged to the

> first respondent. We agree that the appellant had registerable interest in the house, which, as provided under this section [section 59(1) of the Law of Marriage Act, 1971], could be protected by a caveat. The appellant did not register the caveat with the Registrar of Titles. The caveat, would serve as a warning to the second respondent that the house was matrimonial property."

These decisions of the Court of Appeal (supra) settled the law on the non involvement of a spouse in mortgaged matrimonial houses in the sole names of the borrowing spouse without the knowledge and consent of the other spouse before the enactment of the present Land Act, Cap 113, of the Revised Edition, 2002. This case law has now been codified in the present legislation which was enacted in 1999 and came into force on 01.05.2001 Vide G.N. No. 485 of 2001 well before the transaction the subject of this appeal was executed which makes the present legislation not being applicable to the present case. The present legislation provides in Section 112 (3) as follows:

> "A mortgage of a matrimonial home, including a customary mortgage of a matrimonial home, shall be valid only if–
> (a) any document or form unused in applying for such a mortgage **is signed by, or there is**

evidence from the document that it has been assented to by, the borrower and any spouse of the borrower living in that matrimonial home;

(b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the borrower living in that matrimonial home."

[Emphasis supplied].

As already alluded to above, the present case is not covered by the present land legislation for the simple reason that the transaction the subject of this appeal was done in 1999, well before present land legislation was enacted in 1999.

In the instant case the respondent did not register any caveat to protect her interest as provided by section 59 (1) of the Law of Marriage Act. The appellant could therefore not know if the mortgaged house for the loan facility to Ramadhani Athumani Chalamila; the respondent's late husband, was encumbered. Guided by the decisions of this court which I am in full agreement with and those of the Court of Appeal which are binding upon me, I have referred to and discussed hereinabove, I find and hold that the trial magistrate erred in law in holding that it is not mandatory for the spouse to register a caveat to protect the interest under section 59 (1) of the Law of Marriage Act and therefore erred in law in holding that the

appellant is permanently restrained from disposing of the mortgaged property. His exposition of the law was certainly incorrect.

On the last ground of appeal, the trial magistrate was again erroneous. The parties to a Mortgage Deed are bound by the terms and conditions of the Mortgage Deed they executed. In the Deed the appellant and Ramadhani Athumani Chalamila executed on 03.05.1990, it is clearly provided under clause 11 (a) that, in case of default of repayment, the appellant had, *inter alia*, the power of sale of the disputed property to realize the outstanding debt. Let the clause speak for itself:

> "At any time after the principle moneys and interest hereby secured have become payable either as a result of a lawful demand by the Bank (or under the provisions of Clause 10 hereof) **the Bank shall thereupon immediately be entitled without any previous notice ... including** the power to appoint a Receiver and **the power of sale** ..."
> [Emphasis supplied].

The appellant was therefore within the realm of the Mortgage Deed when it announced in the tabloid to have the mortgaged house auctioned with a view of realizing the mortgaged house which stood as security in case the borrower failed to repay the loan as happened in this case. I find fortification in this point in the case of ***National Bank Of Commerce Vs***

Dar Es Salaam Education And Office Stationery [1995] TLR 272; the decision of the Court of Appeal. Briefly, the facts in that case were that the respondent borrowed money from the appellant bank. As security, a house was mortgaged in favour of the appellant. Upon failure to repay the loan the appellant bank exercised its right under the Mortgage Deed and sold the house. The High Court, upon application by the borrower, *inter alia*, set aside the sale. On appeal, the Court of Appeal held – I quote from the headnote – as follows:

> "Where a mortgagee is exercising its power of sale under a mortgage deed the Court cannot interfere unless there was corruption or collusion with the purchaser in the sale of the property".

There is no scintilla of evidence respecting corruption or collusion in the present case. The learned trial Magistrate was, undoubtedly, out of track when he stated that the appellant ought to have obtained a court order before embarking upon the steps to realize the security. And as if to add salt to the wound, the trial magistrate stated that the appellant could realize his outstanding debt by attaching and selling other property belonging to the late Ramadhani Athumani Chalamila. The learned trial Magistrate stated:

> "... there is ample evidence adduced on behalf of the plaintiff that Chalamila also owned a prosperous farm and guest house KIPONZERO

GUEST HOUSE IN Mshindo Area then the debt can be liquidated by attaching and selling those properties."

To say the least, this was an unprecedented statement on the part of the learned trial Magistrate. It might have escaped the trial magistrate's mind that the parties to an agreement are bound by the terms and conditions therein. Attachment of any of the borrower's property was not one of the terms and conditions of the agreement the appellant and respondent's husband executed. What they agreed to be auctioned in case of any failure of repayment was a house standing on Plot No. 82 Block 1B Wilolesi area; not Kiponzero Guest House nor any other property of the borrower.

In the final analysis, I find merit in this appeal. I would allow it with costs. The appellant to have its costs in this court and the court below. The judgment of the trial court is quashed and the decree thereof set aside. The appellant is at liberty to exercise its legal rights under the terms and conditions of the Mortgage Deed it executed with the borrower. Order accordingly.

DATED at IRINGA this 12th day of May, 2014.

J. C. M. MWAMBEGELE
JUDGE