IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 54 OF 2017

(Appeal from the ruling and drawn order of the District Court of Ilala at Samora dated 19th day of August 2013 before Hon. J.Minde SRM)

TANZANIA INVESTMENT BANK LTD---------- **APPELLANT**

VERSUS

1. **MILKA E. GAULA**
2. **FRED A. UISSO** ---------- **RESPONDENTS**

JUDGEMENT

Date of last order: 19.05.2020

Date of Judgement: 17.06.2020

EBRAHIM, J.:

Initially the appellant herein had instituted a suit against the 2nd respondent and Global Monentary Liners Ltd claiming the repayment of the loan amount of Tshs. 11,984,433.59 advanced to them, Civil Case No. 65 of 2006. In securing the mortgage, Plot No. 52930 Block 26C located at Kinondoni Dar Es Salaam was mortgaged as a security for the loan. On 24.09.2009, the trial court recorded and registered

deed of settlement to mark the finalization of the matter between parties.

After signing of the deed of settlement and the becoming a decree of the court, the 1st respondent filed a chamber application under section 95 of the Civil Procedure Code praying for the trial court to set aside the compromise decree of 24.09.2009 and declare the decree to be invalid. Going through the averments of the 1st respondent in her affidavit, she is claiming that the disputed property i.e. Plot No 32 Block 26C situated at Kinondoni area with CT No. 52930 is a matrimonial property and the mortgage was entered fraudulently and it was concealed to her. Therefore she did not give her consent. She averred also that the mortgage agreement was not registered.

The trial magistrate went ahead and framed issues for determination including whether the court was functus officio; whether the absence of spousal consent renders the agreement null and void; and whether the mortgage agreement can be enforceable without being registered by the land registrar. After considering the arguments from both parties she quashed and set aside the decree dated 24th

September 2009 and declared the deed of settlement between the appellant and the 2nd respondent as null and void.

Aggrieved the appellant has lodged the instant appeal raising 5 grounds of appeal which can be grouped into two grounds faulting the trial magistrate to be functus officio and had no jurisdiction to entertain such application. The appellant also complained that the trial magistrate decided on the issue of matrimonial property and registration of mortgage deed without proof thereof.

When the appeal was called for hearing, this court ordered the matter to be disposed of by way of written submission and set a schedule thereat. Both parties adhered to the set schedule.

In this appeal the appellant was represented by Mr. Juventus Katikiro learned advocate; and the respondents preferred the services of Mr. Dennis Mrope, learned advocate.

In support of the appeal, counsel for the appellant submitted the 1st and 2nd grounds of appeal together. In essence he contended that the trial court has become functus officio to set aside the compromised decree which was determined by the same court. He cited the provisions of **Order XLII Rule 1(a) and (b) of the Civil**

Procedure Code Cap 33 RE 2019 and argued that the only available remedy is to challenge the decree by way of review, revision or appeal and not the preferred application. He further cited the case of **Arusha Planters and Traders Ltd & 2 Others Vs. Euro African Bank (T) Ltd**, Civil Appeal No. 78 of 2001 (unreported) at page 13 and 16 to cement the assertion that the judgement can be challenged by way of review or appeal but under certain circumstances it would not be proper to institute a separate suit. He concluded on the point that the trial court had no power to quash its decision and considering that the 1st respondent was not a party to Civil Case No. 65 of 2006.

Submitting on grounds no. 3 and 4 of the appeal, counsel for the appellant contended that the provisions of **section 114(1) and (2) of the Land Act, Cap 113 RE 2002** relied by the trial magistrate imposes a duty to the mortgagor to disclose as to whether the mortgaged property is a matrimonial home or property. Failure of which imposes a legal penalty. He contended also that there was also no evidence tendered to prove the existence of marriage between the 1st and the 2nd respondents nor the evidence to determine whether the said property was a matrimonial property. The magistrate based his decision on the hearsay evidence from the 1st respondent. He

contended the same on the issue of registration that such fact also was not proved. He prayed for the appeal to be allowed.

Responding to the arguments by the counsel for the respondent, Counsel for the respondent through their joint reply referred to **section 21 Rule 57 (i) of the Civil Procedure Code, CAP 33 RE 2002** arguing that objection proceedings are accommodated by the same court hence the 1st respondent had right to institute such application to challenge the consent judgement. Counsel for the respondents went further to explain that the respondents were married in 1993 and the mortgage was entered in 1999 hence the property is a matrimonial property. He referred to the case of **Bi Hawa Mohamed Vs Ally Sefu** (1983) TLR where Court of Appeal defined what constitutes matrimonial assets as per **section 114 of the Law of Marriage Act**. He argued further that in terms of **section 114(2) of Cap 29,** the mortgagee had responsibility to take reasonable steps to verify whether the mortgagor has a spouse or not. He insisted also that the mortgage was not registered with the Registrar of Titles making the appellant being unable to have power of sale over the property. They prayed for the appeal be quashed for want of merits.

I determining this appeal, I shall address the grounds of appeal generally.

I have thoroughly followed the rival submissions and carefully gone through the proceedings in record.

I have firstly observed that the application which is a subject matter of this appeal was preferred under **section 95 of the Civil Procedure Code, Cap 33 RE 2002.** Nevertheless, when replying to the submission by the Counsel for the appellant, Counsel for the Respondent cited the provisions of **Order XXI Rule 57(1) of the Cap 33** in justifying the position that the 1st respondent correctly filed an objection proceeding and the same is entertained by the same court.

With respect to the Counsel for the respondent, I have thoroughly gone through the court records and nowhere that the 1st respondent preferred the objection proceedings. The only application preferred by the 1st respondent was the one forming the subject matter of this appeal which was filed under **section 95 of the CPC.** Even by stretch of imagination, the application filed under **section 95 of Cap. 33** praying for the court to set aside the consent decree can be seen or equated with an objection proceedings. If at all Counsel for the

respondents sees it as an objection proceedings, sadly, it is a great misconception and as such assertion is self-defeating because it means the application was brought under the wrong provision of the law.

The above withstanding, coming to the aspect of objection proceedings as I understand it; I find it apt to reproduce the relevant provision i.e. **Order 21 Rule 57(1) of the Civil Procedure Code CAP 33 RE 2002** which reads:

> ***"57.**-(1) Where any claim is preferred to, or any objection **is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment,** the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit:"*
> (Emphasis is mine)

From the above provision of the law, it is clear that objection proceedings are filed to challenge the **liability** and **propriety of the attachment i.e.** objection proceedings go to investigate and ascertain as to whether the property subject to attachment is of the judgement debtor or not or whether it is protected by any law. It follows that a party can file objection proceedings to challenge attachment a stage which was not reached in this case. More –so

objection proceedings cannot lift a decree but would rather determine with proof the propriety of the property subject of attachment. Therefore, it is my findings here that the application was brought under the wrong provision of the law and in any case it was a misconception as there is no any attachment proceedings known to the court in respect of this matter.

Counsel for the Appellant submitted that the trial court was functus officio to quash its own decision and he further referred to the case of **Arusha Planters and Traders Ltd & 2 Others (supra).** I associate myself with the principle held by the Court of Appeal that consent judgement can be challenged by way of review which would allow the court to vacate its previous decision or appeal if there is a claim of fraud. Nevertheless, the circumstances of the cited case do not fit with the instant case on the basis that in this case the 1st respondent was not a party to the case. Therefore she could not appeal or file for review as those two avenues can be pursued by parties privy to the original proceedings.

In the instant case, the 1st respondent could have come by way of revision seeking the court order to nullify the proceedings so that she

can join the wagon and be availed right to be heard or as per the wisdom of the above cited case of **Arusha Planters and Traders (supra)** and depending on the circumstance of the case institute a separate suit to challenge the procurement of consent decree by fraud as she so alleged. Again considering the prayers made in the application by the 1st respondent, the trial court was not only functus officio to quash and set aside its own decision (see the case of **Yusuf Ali Yusuf @ Shehe@ Mpemba & 5 Others V The Republic,** Criminal Appeal No. 81 of 2019 (CAT-unreported); but also the application filed by the 1st respondent is a strange creature not fitting with any remedies provided by law.

Before I pen off and pass my final order, I would wish to comment in passing as to the submission by the Counsel for the respondent on the marital status of the respondents. He said that the respondents were married in 1993 and the mortgage deed was entered in 1999. I had a peek at the affidavit of the 1st respondent in support of her application at the trial court, she stated under oath that she has been cohabiting with the 2nd respondent for 16 years before the issue of the mortgaged property. Therefore, it is not known where did the Counsel for the respondents concocted his information from; hence the need

for the proof of facts which the trial court did not have as complained by the Counsel for the Appellant. All in all that is the matter before the competent avenue.

All said and done, I find that the trial court entertained the matter which it had no powers to under the law and consequently it had no jurisdiction to so. Accordingly, I allow the appeal, quash and set aside the ruling and drawn order of the District Court of Ilala, at Samora dated 19th August 2013 before hon. J. Minde SRM with costs.

Accordingly ordered.

R.A. Ebrahim

Judge

Dar Es Salaam

17.06.2020