

**IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA**

LAND APPEAL No. 10 OF 2020

*(An appeal originating from the Decision of the District Land and Housing tribunal for
Geita at Geita in Application No. 47 of 2018)*

NATIONAL MICROFINCE BANK PLC ----- APPELLANT

VERSUS

DADU KIDENDEI ----- 1ST RESPONDENT

SHADIA SALEHE KANANI ----- 2ND RESPONDENT

JUDGMENT

24th September & 28th December, 2020

TIGANGA, J

Before the District Land and Housing Tribunal for Geita at Geita, Dadu Kidendei sued the two Respondents Shadia Salehe Kanani and National Microfinance Bank PLC @ NMB for an order for discharge of a house in dispute from being a security for the loan obtained by the 1st respondent from the second Respondent. The trial tribunal granted the application with costs.

That order aggrieved the appellant; who decided to appeal to this court by filing five grounds of appeal namely that,



1. The Honourable trial Chairperson erred in law and fact by her failure to hold that there was enough evidence that the plot on which the house was built was bought by the second respondent in her own names as the sale agreement was tendered and admitted to that effect.
2. That the Honourable trial Chairperson erred in law by her failure to give value to an affidavit which was sworn by the second respondent that she was not married any one.
3. That the Honourable trial Chairperson erred in law by holding that the first and second respondents were husband and wife while there was no evidence to that effect.
4. That the Honourable trial Chairperson erred in law by holding that the suit premise was a matrimonial home while the same was unfinished.
5. That the Honourable trial Chairperson erred in law by usurping jurisdiction and holding that the mortgage and loan agreement were both null and void.

The appellant prayers for the following orders;

- i. The decision of the District Land and Housing Tribunal be quashed and set aside.
- ii. Costs of this appeal and those incurred by the appellant in the trial tribunal be borne by the respondent.
- iii. Any other relief and orders this honourable court may deem fit and just to grant.

Hearing of the appeal was done orally, and during the hearing the appellant was represented by Dr. George Mwaisondola, Advocate while the 1st respondent was represented by Mr. Ernest Makene, Advocate while the 2nd respondent was not represented.

Submitting in support of the 1st and 2nd grounds of appeal Dr. Mwaisondola submitted that the plot in dispute was basically owned by the second respondent Shadia Salehe Kanani and there is evidence for her being the owner of the mortgaged the property in favour of the appellant.

The first respondent allegation that he did not give consent before the suit house was mortgaged was not supported by any evidence. He also submitted that there is no evidence that the said house was a matrimonial house and neither was it proved that the suit premises belonged to him. He submitted further that exhibit D1 proved that the owner of the plot was

the second respondent, and so was the evidence of PW1 that the suit premises was in the name of the second respondent.

He submitted further that section 114 (2) put responsibility on the part of the Mortgagor to disclose his/her marital status and the mortgagee will be taken to have discharged his duty if he will ascertain the marital status. He submitted further that section 114 of the Land Act [Cap 113 R.E 2019] read together with Mortgage Financing Regulations, 2009 GN 355 of 2009. Regulation 4 shows the steps to be followed, which was to require the applicant to declare by affidavit her marital status.

He submitted that in the case at hand the appellant demanded for such a declaration and the second respondent actually declared her marital status. He cited and relied on the decision of the Court Appeal in **Hadija Issah Arelary vs Tanzania Postal Bank**, Civil Appeal No. 135 of 2017, in which it was held that it is a duty of the mortgagor to disclose, his/her marital status which he did in the affidavit taken by her in support of his application for loan. As the land in dispute had no right of occupancy, the ownership was proved by the sale agreement which was tendered as exhibit and was in the name of the 2nd respondent. There is also evidence

as deposed in the affidavit that the 2nd respondent had no husband. However the said affidavit was not accorded weight by the trial tribunal.

On the 3rd ground, which is to the effect that the chairperson was wrong to hold that the 1st and 2nd respondents were husband and wife, the 1st respondent when he was called up to prove as to whether they were husband and wife, he said they contracted a customary marriage, therefore they had no marriage certificate, but instead, he tendered the birth certificate of the children born out of that relationship. The counsel for the appellant submitted that, birth certificate of children cannot be proof of marriage. He advised this court not to condone the reasoning of the learned chairperson as it will be opening a pandora's box which this court will be not able to close in future.

Submitting in support of the fourth ground of appeal, the counsel for the appellant submitted that, it was not correct for the trial chairperson to hold that the house in dispute was a matrimonial home as the same is short of qualities envisaged by section 112 (2) of the Land Act. The base of his argument was that, as it was not a building in which husband and wife ordinarily resides. He submitted that the house was unfinished when it was

mortgaged and was not resided into by the husband and wife but by the care taker. Therefore, it was not a matrimonial home.

The fifth ground is that, the chairperson usurped the jurisdiction by holding that the mortgage and loan agreement were both null and void.

He submitted that the District Land and Housing Tribunal are empowered to deal with land disputes only as per section 33 of the Land Disputes Courts Act [Cap 216 R.E 2019]. In the case at hand the dispute was on mortgage not on the loan agreement, as the loan agreement is regulated by the Law of Contract Act. He prayed the appeal to be allowed as prayed.

Replying to the submission in chief made by the counsel for the appellant, Mr. Ernest Makene Advocate for the respondent, the submitted that, the exhibit D1 was witnessed by the Shina leader who is not recognised in the government structure, therefore it was signed before an incompetent person at Kalifonia not at Buyaga Mbelele as alleged.

He submitted further that, the area written on a document and the one on which parties are litigating, in this dispute are two different areas, he submitted further that, the area of Buyaga Mbelele Kitongoji No. 589, while that of Kalifonia is on Kitongoji No. 585, and therefore that the trial

court was correct when it held that, the claimed land is different from what was mortgaged.

On the second ground of appeal, it was, according to him proved beyond reasonable doubt that the 2nd respondent was his wife and therefore failure of the 2nd respondent to get spousal consent was against the law.

He referred this court to statutory and dictionary meaning of marriage by citing Blacks Law Dictionary on the term marriage both insisting on the term voluntariness between the parties to it. According to him, the certificate of birth was a result of the customary marriage. He asked the court to give no weight of the sworn affidavit as it did not say in its title and content that she had no husband.

He cited the case of **Ignasio Mesina vs Willo Investment SPPL**, CAT - DSM in which it was held that the affidavit tainted with untruth is not an affidavit at all worth a name. He submitted that, the affidavit complained of was showing the marital status of two years back, that is why the trial tribunal found it to be lies.

On 3rd ground of appeal which is that, the 1st respondent was not aware of the fact that the second respondent took a loan. However even

after discovery that she actually took a loan, the 1st respondent was ready to pay but the appellant refused.

The counsel for the 1st respondent said that the appellant submitted that the house was a matrimonial home but to the best of the evidence the term used was a matrimonial house as opposed to a home. Last he said the tribunal had jurisdiction to entertain the matter and give the order it gave.

Dr. George Mwaisondola, Advocate submitted in rejoinder that, the issue of location of the suit land was not raised at trial; it is therefore new and asked the court to ignore it.

Regarding ground number 2 of appeal, he submitted that exhibit D2 had value and had to be taken into account, while in respect of ground No. 3 he asked the court to have a look at exhibit P1 which shows who are the mother and father, but not necessarily that they must be married. While with regard to ground 4 of the appeal, he submitted that the whole case based on matrimonial home not a house. That marked the arguments by the parties, hence this judgment.

Now from the evidence, there is no dispute that the 2nd respondent took a loan from the appellant, the evidence is also clear that she

mortgaged as a security for a loan, the house in dispute. It has also been proved that house was built on the unsurveyed plot which was purchased by the 2nd respondent.

Further to that, it is evident that the 2nd respondent took an affidavit proving that she had no husband which facts assured the appellant that there was no need of consent from any other person. It has also been proved that, the 2nd respondent failed to pay the loan consequent of which the appellant decided to proceed against the security.

It is the appellant's act to proceed against the security which prompted the 1st respondent, who sued the appellant and the 2nd respondent.

The 1st respondent satisfied the trial District Land and Housing Tribunal that the house in question was matrimonially owned and used, and that it was mortgaged without the consent of the spouse, that is a husband.

The record shows that, the 1st respondent sued the bank and the 2nd respondent, but the second respondent did not file written statement of defence and did not even appear to defend the suit. Following her non

appearance and failure to file written statement of defence, the case proceeded exparte against her.

That behaviour or somewhat a trend was also exhibited in this appeal as besides being served with the appeal documents, yet the 2nd respondent did not appear. Following her non appearance and non filing the written statement of defence before the trial tribunal, the evidence submitted which is the affidavit affirmed by herself declaring her to be single and unmarried, the sales agreement showing that she was the one who purchased the land in exclusion of the 1st respondent, remain intact and uncontroverted.

It is true that the law requires where any disposition of land or any interest therein involving a land which is owned by both husband and wife, a party so disposing should have the consent sought and obtained from the other spouse. That is according to section 114 of the Land Act [Cap 114 R.E 2019] as amended by section 8 (2) (3) of the Mortgage Financing (Special Provisions) Act, 2008 requires a consent to be obtained.

However, while the mortgagee is duty bound to require the mortgagor to disclose the information of spouse ship and marital status,

the said law as amended requires the mortgagor to disclose the information of the spouse and marital status.

As properly interpreted by the Court of Appeal in the case of **Hadija Issah Arelary vs Tanzania Postal Bank (supra)** in which it was held *inter alia* while citing the provision of section on 8 (2) (3) of the Mortgage Financing Act (supra) that;

"It shall be the responsibility of the Mortgagor to disclose that he has a spouse or not and upon such disclosure the Mortgagee shall be under the responsibility to take reasonable steps to verify whether the applicant for a mortgage has or does not have spouse"

Regulation 4 (1) (c) of the Land (Mortgage) Regulations, 2005 which read;

"If the applicant states that he or she is not married and the mortgagee has reason to believe that, the statement might be incorrect, the mortgagee may require the applicant to produce an affidavit to the effect that the applicant is not married".

In this case there was a declaration by the 2nd respondent that she has no husband, in the absence of evidence from herself saying that she

had a husband, there was no ground upon which the 1st respondent could have been believed.

That being the case, I find the trial tribunal to have erred in its holding that the 1st respondent was a husband of the 2nd respondent and therefore, the appellant was required to obtain his consent before the mortgage had become valid. That said, I find the 1st, 2nd and 3rd grounds of appeal to have merits they are upheld for the reason given.

Now having upheld the three grounds, I find the rest of the grounds to have been also covered in the three grounds, consequently, the appeal is allowed to its entirety, the decision of the District Land and Housing Tribunal for Geita is reversed, and the orders thereto are set aside with costs to be paid by the respondent.

It is so ordered.

DATED at **MWANZA**, this 28th day of December 2020




J. C. TIGANGA

JUDGE

28/12/2020