IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

CIVIL APPEAL NO. 9 OF 2020

(Originating from the Resident Magistrates' Court of Arusha at Arusha, Civil Case No. 5 of 2018)

FANUEL ZAKAYO ..... APPELLANT

Versus

ANETH RAPHAEL ..... 1ST RESPONDENT

CRDB BANK PLC ..... 2ND RESPONDENT

JUDGMENT

29th March & 30th April, 2021

Masara, J.

In the Resident Magistrates' Court of Arusha (the trial Court), the Appellant sued the Respondents herein urged the court for a declaration that the loan agreement executed by the first and second Respondents was *void ab initio*. The Appellant also prayed for general damages as well as costs of the suit. Upon hearing the parties, the trial Court dismissed the suit, declaring the loan agreement to be a valid contract. The Court further found that spouse consent in respect of the loan agreement was legally procured. The Appellant was dissatisfied, he has therefore preferred this appeal on the following grounds reproduced verbatim:

a) *That, the trial Court erred in fact and law when adjudicated that, there were spouse consent while I have never (sic) consented the matrimonial home to secure the alleged loan and that, there is no evidence to that fact;*
b) *That, the trial Court erred in law and fact when it failed to consider the fact that the Appellant herein is not a party to the loan agreement alleged and that there is no mortgage established against him; and*
c) *That, the trial Court has not properly analysed the evidence adduced in the trial otherwise it wouldn't have dismissed the claim.*

Basing on the above grounds, the Appellant prays that the appeal is allowed and the decision of the trial Court is quashed or reversed with costs. The Appellant further prays for a declaration that the Respondents entered into a contract without having his consent as the husband of the first Respondent. At the hearing the Appellant entered appearance through the services of Mr. Lengai Merinyo, learned advocate. The first Respondent appeared in Court in person, unrepresented while the second Respondent was represented by Mr. John Mushi, learned advocate. The appeal was heard through filing of written submissions.

Before delving into what was argued by the parties in this appeal, it is desirable to recount facts leading into the appeal, albeit briefly. The first Respondent is the wife of the Appellant. The two contracted a Christian marriage in 2006 and are blessed with two issues. The second Respondent is a legal entity dealing with banking transactions. Both the Appellant and the first Respondent are business dealers, whilst the Appellant deals with mining the first Respondent owns a boutique.

In August 2016, the first Respondent approached the second Respondent seeking to be advanced a credit facility amounting to TZS 50,000,000/=. She was issued with the requisite forms to fill in. Such forms include land forms Number 40, 29 and 30. She also told the second Respondent that she had another outstanding loan with NMB Bank amounting to 15,000,000/= so she intended to repay it in the event her facility with the second Respondent succeeded. On 1/10/2016, the first Respondent was issued with a credit facility of TZS 50,000,000/= as requested. Before she was handed the money, the second Respondent first settled her

outstanding balance of TZS. 15,000,000/= with NMB, and the remaining amount was deposited in the first Respondent's account. A schedule of repayment was prepared.

The first Respondent started repaying the loan and managed only six months instalments. It would appear that her business was not doing good, thus she defaulted on the following instalments. This prompted the second Respondent to claim repayment of the loan. Despite several reminders, and due to deterioration of business, the first Respondent was unable to continue depositing instalments as agreed. The second Respondent issued notice of default to the Appellant whose signature appeared in the mortgage deed as the mortgagor. At the same time bank officers visited his place with posters showing that the Appellant's house which was pledged as security to the loan was about to be auctioned. That is when the Appellant realised that the first Respondent had taken a loan from the second Respondent and that she had pledged, as security, their matrimonial house with Certificate of Title No. 19219, Farm No. 1511, L.O No. 222131 located at Sekei Area in Arumeru District within Arusha Region. In a bid to make follow ups, the Appellant discovered that the mortgage agreement and the notification form bore his alleged signature, implying that he acknowledged the credit facility. He was unhappy about it. He therefore filed Civil Case No. 5 of 2018 at the trial Court as indicated earlier.

The issues I am called to decide are reflected in the three grounds of appeal; namely whether the mortgage of the suit property was invalid for lack of spousal consent and whether the loan agreement was valid.

Submitting in support of the first ground of appeal, Mr. Merinyo informed the Court that according to the pleadings and evidence on record the borrower is the first Respondent. That the Appellant never took a loan from the second Respondent. Therefore, consent to pledge the matrimonial home as collateral should have come from the Appellant and not from the first Respondent. According to Mr. Merinyo, exhibit D1 titled Spouse Consent shows that it is the first Respondent who consented to her own loan. Elaborating on what amounts to spouse consent as contained in section 59(1) of the Law of Marriage Act, Cap. 29 [R.E 2019], Mr. Merinyo referred to the decision in the case of ***Samwel Olung'a Igogo & 2 Others Vs. Social Action Trust Fund & Another*** [2005] TLR 343 which discussed in detail on what amounts to spouse consent and its effects.

Amplifying on the second ground of appeal, Mr. Merinyo submitted that since the trial Court admitted that the Appellant is not the borrower and that it was the first Respondent who borrowed money from the second Respondent, it follows that there is no contractual relationship between the Appellant and the second Respondent. In that regard, there is no mortgage established against the Appellant. The learned counsel also referred to paragraph 7 of the plaint which states that the loan agreement was between the first and second Respondents, and that paragraph was admitted under paragraph 4 of the Written Statement of Defence of the second Respondent.

Furthermore, Mr. Merinyo intimated that Land form No. 40 (exhibit D1) does not create third party mortgage as stipulated under section

112(2)(b) of the Land Act, Cap. 113 [R.E 2019]. According to the learned advocate, land form No. 40 is silent as to whose favour the Appellant created the mortgage. The first Respondent does not appear anywhere in that document. Moreover, the signature of the Appellant in landform No. 40 differs from his signature in the plaint. This, in his view, raises doubts that it is not the Appellant who signed the document.

Submitting on the third ground of appeal, Mr. Merinyo was of the view that had the trial Magistrate analysed the evidence properly, the stated discrepancies apparent in the loan transaction would have been cured. He maintained that the Respondents colluded and pledged the Appellant's matrimonial home as security. He added that there is no documentary evidence supporting the second Respondent's testimony that they transferred the loan from NMB Bank to themselves. Further, the disposition form No. 29 purported to be signed by the Appellant does not show the particulars of the mortgage involving the first Respondent in it. He maintained his prayer that the appeal be allowed by quashing the trial Court decision with costs and a declaratory order that the Respondents' loan agreement is *void ab initio*.

The Appellant's version was, understandably, not challenged by the first Respondent. She admitted to have taken the loan amounting to TZS 50,000,000/= from the second Respondent without involving the Appellant. She added that she was persuaded by one Erasmo, who is the loan officer of the second Respondent. According to her submission, it was the same Erasmo who processed everything. All she gave him is her pictures, pictures of the Appellant and the title deed. She maintained that

the Appellant noticed the loan facility after she had failed to repay the loan and after she was issued with the statutory default notice. She admits that she was asked by the loan officers to sign the consent form while she was the borrower. She further admits that she is now in family turmoil with the Appellant, therefore she prays that the matrimonial home be released from the mortgage and the second Respondent agree to make arrangements with her so that she continues paying the unsettled balance.

Contesting the appeal, Mr. Mushi, in response to the first ground of appeal, submitted that the Appellant signed the mortgage agreement and, in that sense, he became the mortgagor. That the first Respondent could not be a mortgagor merely because she was the beneficiary of the loan. In his view, spouse consent is signed by a spouse of the owner of the mortgaged property. Therefore, the first Respondent properly signed the spouse consent as the wife of the Appellant giving her consent for the Appellant to mortgage their matrimonial home. According to Mr. Mushi, the Appellant is the mortgagor as defined under section 112(2)(b) of the Land Act. Therefore, upon being furnished by the spouse consent, the second Respondent executed the loan facility as per the law. Mr. Mushi distinguished the cited case of ***Samwel Olung'a Igogo & 2 Others Vs. Social Action Trust Fund & Another*** (supra) stating that in that case there was no spouse consent at all unlike the case at hand in which, as per exhibit D1, there is spouse consent from the first Respondent.

Responding to the second ground of appeal, Mr. Mushi exemplified that there was established a contractual relationship between the Appellant

and the second Respondent which is mortgagee - mortgagor relationship as per section 112(2)(b) of the Land Act. Mr Mushi admitted that the Appellant is not the borrower, but that he agreed his property to be pledged as security for the loan as exhibited by exhibit D1. Mr. Mushi maintained that the issue of fraud raised by Mr. Merinyo does not hold water since there is no proof that such alleged fraud was reported to the police or any other investigative organ. He fortified that fraud requires proof beyond reasonable doubt, therefor since there is no criminal proceedings instituted against the Respondents, such allegations are unfounded. To support his argument, the learned counsel cited the decision of this Court in ***Erasto Bartholomeo Mpemba & Another Vs. Halifax Investment (T) Limited & Another***, Land Case No. 240 of 2013 (unreported).

Countering the assertions in the last ground of appeal, the learned counsel submitted that the complaint that there is no documentary evidence proving that the second Respondent took over the credit obligations that were between the first Respondent with the NMB Bank to itself is an afterthought and it is a new ground that was never raised neither in the trial Court nor in the pleadings. He maintained that parties are bound by their pleadings and that the Appellant cannot be allowed to take the second Respondent by surprise. Mr. Mushi backed his assertions with the decisions in ***Jimmy Brown Mwalugelo Vs. BOA Bank & Others***, Misc. Land Application No. 940 of 2017 and ***The Registered Trustees of the Archdiocese of Dar es Salaam Vs. The Chairman Bunju Village Government & Others***, Civil Appeal No. 147 of 2006 (both unreported). He reiterated that the Appellant's counsel is barred from raising a new

issue in the submissions. He concluded that the fact that there is no documentary evidence is illogical since it was not among the contested issues in the trial Court.

In a rejoinder submission, Mr. Merinyo reiterated that Mr. Mushi defined mortgagor in isolation with the meaning of third-Party mortgage. He maintained that it is undisputed that what was presented in the trial is a third-party mortgage created under section 113(2) of the Land Act. It was Mr. Merinyo's argument that an occupier can mortgage his own property under section 113(1) or he can use his property to create a third-party mortgage under section 113(2). Since the nature of the mortgage involved here is third party mortgage, it must be created by the owner. On the question of the loan from NMB, Mr. Merinyo submitted that it was raised by DW2 in his evidence, therefore it is not a new fact. On the need to report the missing title deed to the police, Mr. Merinyo stated that as soon as she was issued with default notice, the first Respondent revealed to the Appellant that the title deed was with the second Respondent.

Having stated what the parties submitted in support or against the appeal, I will deal with the grounds of appeal seriatim covering the issues as already stated.

Starting with the first issue, I note that the evidence adduced is to the effect that the loan agreement was signed between the first Respondent and the second Respondent. According to the evidence adduced by the Appellant, who was the Plaintiff in the trial Court, he noticed existence of the loan agreement when the second Respondent issued them with

default notice. He maintained that he never signed any of the loan documents. This was admitted by the first Respondent, who admitted to have taken the loan amounting to TZS 50,000,000/= for the purpose of running her business without informing him. In her testimony, the first respondent likewise admitted that she was lured by the loan officer of the second Respondent one Erasmo, who assisted her in filling all the forms. All these facts were also admitted in her written submission in this appeal.

When cross examined by Mr. Merinyo, DW2 who testified on behalf of the second Plaintiff in the trial Court admitted that the loan facility was not signed by the Appellant. On further cross examination, DW2 stated that Samwel is not the one who took the loan, rather his wife, Aneth. He further stated that the spouse consent was signed by Aneth, the first Respondent.

From the above testimonial accounts, the borrower was the first Respondent. Incidentally, the first Respondent, the borrower, did as well sign the spouse consent. In his reply submissions, the counsel for the second Respondent submitted that the Appellant signed the mortgage since he is the owner of the mortgaged property, and the first Respondent signed the spouse consent since she was his wife consenting their matrimonial home to be pledged as security to the loan. With due respect, the learned advocate is misguided. One cannot be the borrower and at the same time sign the spouse consent.

Spouse consent refers to a willingness/readiness of a partner (who are dully married) assenting their matrimonial property to be disposed either

by sale, mortgage or lease. It is not defined in our laws. However, any disposition of matrimonial house, which is acquired jointly by a couple, cannot be disposed of in the absence of spouse consent. Equally, in mortgage transactions, spouse consent is very crucial. It is the requirement of the law under section 114 (1) (a) of the Land Act which provides:

> *"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 homes is signed by, 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*** *..."*(emphasis supplied)

Spouse consent is a prerequisite in any lease, sale or mortgage of a matrimonial home. Where spouse consent is not obtained in any of the above transactions, such transaction is ineffectual. Section 59(1) of the Law of Marriage Act also provides:

> *"59.- (1) 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 supplied)

Regulation 5 of the Land (Mortgage Financing) Regulations 2009, G.N. No. 355 of 2009 also provides for requirement of spouse consent in mortgaging matrimonial home. The Court of Appeal in the case of ***National Bank of Commerce Limited Vs. Nurbano Abdallah Mulla***, Civil Appeal No. 283 of 2017 (unreported), held:

"From the wording of section 114 (1) (a) of the Land Act, the word shall implies that ***consent from a spouse or spouses is a mandatory requirement when one of the spouses intends to mortgage a matrimonial home.*** *"*(emphasis added)

From the above provisions of the law and the cited authority, it is apparent that it is not the borrower who should consent on the pledging of matrimonial home as security to the loan. Consent ought to come from the remaining spouse. The rationale behind this requirement is that in case of default, it is the borrower who should be questioned first. From the wording of the above cited provisions, it is the borrower who should obtain consent from the other spouse. In ***National Bank of Commerce Limited*** (supra), the Court further observed:

"From the above position of the law we are certain that the failure of the appellant to obtain a consent from the respondent for the second overdraft facility was in contravention of the mandatory requirement under section 114 of the Land Act ***as the appellant knew for sure that the respondent was the wife of the mortgagor. In that respect it was expected for the appellant to seek consent just like what she did in the first overdraft facility.*** *"*(emphasis added)

The above decision is to the effect that as the husband was the borrower, consent was expected to come from his wife. Similarly, in the case under scrutiny, the first Respondent had to seek consent from the Appellant who was her husband. The spouse consent signed by the first Respondent (as exhibited in exhibit D1) is therefore of no legal effect. She cannot act as the borrower and consent to the mortgage at the same time. Condoning such act would defeat the very meaning of what a spouse consent is. Since the spouse consent was signed by the first Respondent and not the Appellant, it is right to assert that spouse consent was not obtained as

per the law. The first issue is answered in the affirmative, that is the mortgage was invalid for lack of spousal consent.

Regarding the second issue, it is the opinion of this Court that the issue is intertwined with the first one. As alluded above, the evidence adduced at the trial Court exonerated the Appellant from liability for the loan as he was not the borrower. Although the credit facility agreement was not tendered in evidence, the fact that he was not the borrower was not disputed by either party. From the record, the mortgage deed seems to have been signed by the Appellant, who undoubtedly was not the borrower. The Appellant also appears to have signed the notification form, which eventually was not attended by the responsible authorities. The first Respondent admits that the Appellant did not sign any of the documents relating to the loan facility. Her testimony augments the advocate for the Appellant's assertion that the signature of the Appellant in the mortgage deed was forged.

I agree with them for a number of reasons. One, there was no evidence that the Appellant signed the mortgage deed. DW2 admitted that there was no evidence that the Appellant signed land form No. 40. It is not made clear as to why that form was signed at the premises of the Appellant, instead of the second Respondent's office. Further, how could it be signed at home and the same be notarized by a magistrate who did not witness the Appellant signing it? It was not revealed who took the said form to the magistrate for notarisation. This leaves the Court with lots of doubts.

Two, assuming that it was signed by the Appellant, the form is defective as it does not state on whose favour the mortgage was to be executed. As rightly stated by Mr. Merinyo, this being a third-party mortgage, it ought to have included the name of the first Respondent in whose favour the mortgage was executed. In the absence of such detail, the Appellant appears to be the borrower, which is not the case.

Three, section 113(4) of the Land Act and Regulation 7 of G.N No. 355 of 2009 make it mandatory for mortgages to be registered. The mortgage deed document in the record of the trial court is not stamped, which makes it ineffectual. Further, the second Respondent did not tender any exhibit proving that the mortgage deed was registered. Even the Notification to the Commissioner for Lands is not filled or signed by the Commissioner's Office bearers. In his evidence, DW2 stated that they paid fees amounting to TZS 211,500/= but there is no receipt evidencing that and the said amount is not filled in the Notification form. This renders the two documents purported to be signed by the Appellant invalid documents.

It is noted from the record that as early as on 31/10/2018, the Appellant through his advocate, Mr. Mruma, prayed that the signatures in the mortgage deed and notification form be investigated by a handwriting expert. In its ruling delivered on 2/11/2018, the trial Court turned down his prayer for what it believed it was taken prematurely. It is not clear from the record whether such attempt was made after the hearing commenced. However, it is noted that the Appellant has on several occasions disputed to have signed the documents. As intimated earlier,

the first Respondent admitted that fact. Considering the ailments in the purported exhibits D1, I have no reasons not to believe the Appellant that he did not sign any of the said documents. Mr. Mushi's assertion that the Appellant signed the mortgage deed as the owner of the property is unfounded. That concludes the second issue, which I answer in the negative.

Before concluding, I wish to say a few things relating to what was submitted in support and against the third ground of appeal. That is notwithstanding that most of it has been dealt with while discussing the two issues and grounds hitherto. This Court being the first Appellate Court is at liberty to re-evaluate the evidence and come up with new findings if need be. The Court of Appeal decision in ***Swalehe Wadi Salum Vs. Republic***, Criminal Appeal No. 206 of 2010 (unreported) had this to say regarding that power:

> *"Given the special circumstances surrounding this matter and being a first appellate court, we are of the considered view that we are entitled to look at the evidence, particularly that of PW1, and make our own finding of fact."*

I have to a great extent re-evaluated the evidence while determining the two issues above. However, there are other shortfalls in the trial judgment that would have been avoided had the trial Magistrate taken time to carefully scrutinize the evidence adduced. In addition, there are matters raised by counsels that need to be commented on. Hereunder, I highlight, albeit in passing, for the purposes of clearing the record.

I start with the evidence by DW2 to the effect that the second Respondent transferred the first Respondent's loan from NMB Bank to itself. Mr.

Merinyo's concern was that there is no proof to that effect. However, Mr. Mushi's contention on this was that it was a new issue raised at the appeal stage. I am at one with Mr. Merinyo. This is not a new issue as it was not raised by the Appellant in his submissions. This came about in the evidence by DW2 during defence hearing. It has to be noted that during defence hearing, the Appellant had already testified, therefore there is no way he could have raised that issue except at this appellate stage. It cannot therefore be a new issue that would have taken the second Respondent by surprise.

Secondly, I note that the trial Magistrate did not make a determination as to how the Appellant was implicated in the loan agreement. All she determined is that there was valid spouse consent. At page 8 of the trial Court judgment, it states:

> *"I had an opportunity to hear the evidence and exhibit tendered before this court and noticed among other things that, the agreement used to secure loan from the 2nd Defendant had proper spouse consent to mortgage matrimonial property. The same is the case because, the mortgage officer come (sic) and testify of complying with the condition of spousal consent (sic). The evidence to that effect was tendered before this court and marked D1 collectively."*

The trial Court did not address its mind on the validity of the mortgage deed and the loan facility. That was wrong. Presence of the spouse consent, which was from the first Respondent, and at the same time the borrower, could not justify existence of a loan agreement. More was required to prove the existence of the loan agreement. That would have been apparent had she made proper scrutiny of the evidence before her.

It is also irking to note that the trial Magistrate decided to name three exhibits as exhibit D1 collectively. Those were three distinct documents, signed by different people for different purposes. Such naming makes their reference somehow cumbersome. It could have costed the trial Magistrate nothing to give them distinct identities.

There is yet another serious mishap that was not even addressed by the advocates for the parties. It involves the way the trial Magistrate dealt with the issues raised. Two issues were framed at the hearing, but in her judgment, the trial Magistrate discussed only the first issue. The second issue which touches the reliefs the parties are entitled to was left undetermined. This, in my view, left the judgment hanging and even inexecutable at the end. I am of that view because at the end of the judgment it was not made clear whether the second Respondent was to be paid the unpaid loan or not. If so, even the amount payable was not disclosed and whether it was the Appellant or the first Respondent to repay the outstanding balance. All these issues needed to be resolved in the second issue which she left unattended. The Court of Appeal faced an akin circumstance in ***Mantra Tanzania Limited Vs. Joaquim Bonaventure***, Civil Appeal No. 145 of 2018 (unreported). It observed:

> *"In our considered view, the omission to consider whether or not to grant the relief sought by the respondent vitiated the impugned decision because it left that crucial issue undetermined."*

See also: ***Sosthenes Bruno and Another Vs. Flora Shauri***, Civil Appeal No. 81 of 2016, ***Peter Ng'homango Vs. The Attorney General***, Civil Appeal No. 114 of 2011 and ***Joseph Ndyamukama*** *(Administrator*

of the Estate of the late Gratian Ndyamukama) ***Vs. N.I.C Bank Tanzania Limited and 2 Others***, Civil Appeal No. 239 of 2017 (all unreported).

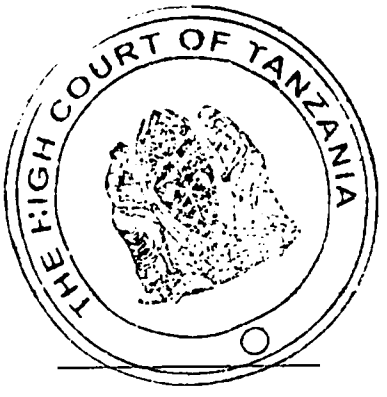
From the above authorities, omission of the trial Magistrate to determine the issue of reliefs the parties entitled to was relevant in determining the parties' dispute. As per the above authorities, such error is fatal as it renders the trial judgment defective. The remedy may be to nullify the judgment of the trial Court and remit back the file so that the undetermined issue is set for determination by the same trial Court. However, I will not take that course for the reasons advanced earlier on while dealing with the first two grounds.

To sum up, it is apparent that spouse consent in the mortgaging of the matrimonial home was not legally procured. It was given by a wrong spouse, which makes it illegal. There is every possibility that the entire process of advancing the loan facility to the first Respondent by the second Respondent was colluded by the bank credit section for reasons best known by themselves. This Court is satisfied that the Appellant was not involved in the transactions. In the absence of a valid spouse consent, the mortgage deed pledging the matrimonial home with Certificate of Title No. 19219, Farm No. 1511, L.O No. 222131 located at Sekei Area in Arumeru District within Arusha Region as security for the loan borrowed by the first Respondent is rendered invalid. The cited case of ***Samwei Olung'a Igogo & 2 Others Vs. Social Action Trust Fund & Another*** (supra) is instructive in this aspect. Since the mandatory spouse consent was not given by the Appellant, and since the Appellant appear to be a

borrower while in fact he was not, the alleged loan agreement is rendered *null and void.*

For the above reasons, the appeal is allowed in its entirety. The trial Court decision is hereby quashed and set aside. The second Respondent to pay the Appellant costs of this suit and those of the trial Court.

Order accordingly.



Y. B. Masara
JUDGE
April 30, 2021