

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL No. 36 OF 2020

*(Originated from the Court of Resident Magistrate for Arusha at Arusha, Civil case
No. 14 of 2018)*

BETWEEN

ALLEN ANANIA HIZZA..... APPELLANT

AND

BERTHA PETER NNKO.....RESPONDENT

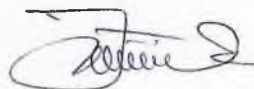
JUDGMENT

04th July & 05th August 2022.

TIGANGA, J

The appellant herein being aggrieved by the decision of the court of Resident Magistrate of Arusha in Civil Case No. 14 of 2018, he appealed before this court on the following grounds;

- i. That, the trial Magistrate erred in law and in fact for failure to rule that the respondent herein failed to discharge her duties and obligation to pay the loan as it was ruled by the Court.
- ii. That, the trial Magistrate erred in law and in fact for failure to analyse and interpret the contents of annexure "X" which was admitted in evidence consequently entered in the wrong and unjust judgment.



- iii. That, the trial Magistrate erred in law to rule that there was appellant's consent in mortgaging the said house at Olasiti leading to this dispute.
- iv. That, the trial Magistrate erred in law and fact for failure to evaluate and analyse evidence and leading into the wrong and unjustifiable conclusion.

The appeal was opposed by the respondent. In order to understand the gist of this appeal, the background of this matter is important. The background of the case albeit briefly is that, the appellant sued the respondent before the Court of Resident Magistrate for Arusha, at Arusha vide Civil Case No. 14 of 2018, claiming Tsh. 58,230,000/=emanating from the division of matrimonial properties ordered by the Court of Resident Magistrate for Arusha in Matrimonial Cause No. 22 of 2014, in which the court decreed that, the house situated at Olasiti Kati in Arusha city being among the properties obtained jointly during the marriage between the parties which was ordered to be sold and the proceeds of the sale be divided between the parties in this case. The order was that, after the sale, the proceeds be divided in equal shares subject to the requirement that, if the said house is a subject of mortgage, both parties

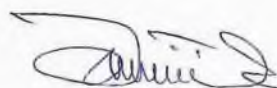


pay the loan to redeem the house which was under mortgage after after servicing such loan, the remaining proceeds be divided equally.

Parties were represented by Advocates, while the appellant was represented by Mr. Ephraim Koisenge, the respondent was by Mr. Sheck Mfinanga, both learned Advocates. With leave of the court, hearing of the appeal was done by written submissions. In efforts to argue the appeal, the Counsel for the appellant submitted in support of the first ground of appeal that, as per exhibit PE1 the appellant was neither a party to the loan agreement nor was he involved in any of the loan processing procedure.

According to him the evidence of DW3 who is the Bank officer with enough knowledge of the bank's loan procedures, is to the effect that, their customer Bertha Peter Nnko, the respondent, told them that she was single and had never married and she filed an affidavit that the ownership of the property was on her name of Bertha Anwery Nnko.

He further submitted with regards to the first ground of appeal, that an appellant was not a party to that loan taken by the respondent, hence, he has no obligation to repay the same. In his view, since the respondent is the one who took the loan, she was obliged to pay the loan and avoid defrauding the bank. He further submitted that, the respondent was



supposed to honour the court decree in Matrimonial Cause No. 22 of 2014 that she had to grant the appellant half of the shares of the sale's proceeds of the house at Olasiti in Arusha city which was Tsh. 116,460,000/=

With regard to the second ground of appeal, the Counsel for the appellant submitted that, exhibit PE1 clearly shows that, the trial court ordered for the 50% division of the said proceeds of the sale of the house at Olasiti in Arusha city and parties be obliged to repay the loan equally. The loan facility evidences that the respondent is the one who took the loan and she is also obliged to repay it before selling the house. Then, after selling the house, he was supposed to divide the proceeds in equal shares between her and the appellant.

In support of the third ground of appeal, the counsel for appellant submitted that, the respondent as per the evidence of PW1 and PW3 is the one who applied for the loan. That being the case, he submitted that in his view, the court erred to call for an affidavit while it did not address the question of all other documents which indicate if at all, the appellant was involved in the loan processing and obtaining.

Finally, while arguing in support of the fourth ground of appeal, the counsel stated that, the trial court failed to evaluate and analyze the

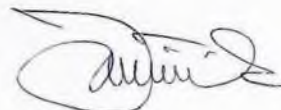


evidence on records leading to the wrong and unjust conclusion. The evidence is clear as stated by PW3 that, the respondent sold the house at Olasiti in Arusha city and made new agreement with the bank on how she will repay the loan. The house at Njiro was not sold since it was a security for another loan. He concluded that, the appellant has proved his case in the balance of probabilities hence this ground should also be allowed.

In reply submissions made in respect of the 1st ground of appeal, the Counsel for the respondent submitted that the appellant has admitted that, he has never taken a loan, even the trial court observed that the appellant and his witnesses failed to prove their case at the required standard, he further stated that in exhibit PE -1 it is clearly shown that the appellant has never been a party to the loan taken by the respondent.

He further replied to the 2nd ground of appeal, that it is very unfortunate that the appellant needs equal shares from the sale's proceeds of the house at Olasiti in Arusha City, but he doesn't want to be responsible to cooperate with the respondent to repay the loan.

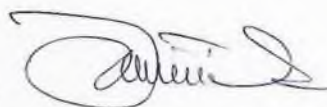
In reply to the 3rd and 4th grounds of appeal, the learned Counsel for the respondent submitted that, the allegation that the respondent sworn an affidavit that she is not married and that the house is not part of matrimonial assets as stated by PW3 before the trial court is not

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justifiable, the appellant has failed to prove that he did not consent to the loan taken and has even failed to testify by either bringing the witnesses from the CRDB bank from where the loan was taken or any document showing to substantiate his allegation that, while processing the loan the respondent sworn affidavit alleging not only that, she was not married but also, the house is not part of the matrimonial properties.

Having passed through both parties' submissions made in support and opposition of appeal, I find the main issue for determination is whether the appeal before this court is meritorious.

In such endeavour, I have passed through the lower court's records to ascertain the parties' status of ownership on the said house which the appellant claims for division of the proceeds of its sale. To be specific, the lower court records which I passed through are the two judgments of the trial court in Matrimonial Cause No. 22 of 2014 and Civil Case No. 14 of 2018. Starting with Matrimonial Cause No. 22 of 2014 in which Bertha Peter Nnko was the Petitioner and Allen Anania Hizza, the current appellant was the respondent, the trial court found regarding the ownership of that house at Olasiti kati.

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Looking at page at page 6 paragraph 4 and page 7 paragraph 3, of the said judgment of the trial court, which for purpose of clarity are hereunder reproduced as follows:

Starting with page 6 paragraph 4 the trial Court held inter alia that;

"The Petitioner and the respondent owned a house located at Olasiti kati, but both have not explained before this court on the extent of their contributions as greater than the other among them in acquiring the said house, therefore this court agrees that, both parties had equal shares on the said house."

While at page 7 paragraph 3 the trial court in the course of deciding it ordered that;

"I further order that, the said house located at Olasiti kati which is said to be the matrimonial property be sold, and the sale's proceeds be divided to the parties at the rate of 50% per each. If the house is subject of mortgage or is pledged as a security for a loan, the loan should be paid first before the division of the sale's proceeds of the said house at Olasiti."

As per the above reproduced paragraphs, it goes without saying that, the trial court in Matrimonial Cause No.22 of 2014 realized that, both, the appellant and the respondent had equal shares in ownership of the particular house at Olasiti Kati. It is also the findings of the trial court that,

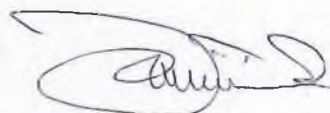
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since the house was subject of the mortgage, pursuant to the order of the trial Court, parties are obliged to repay the loan at CRDB Bank, then divide the proceeds of the sale of the said house at the rates ordered by the court.

Gazing at the record of the trial court, it has not been shown that, the appellant Allen Anania Hizza has ever appealed against the decision of the trial court in Matrimonial Cause No. 22 of 2014 to challenge the requirement of repaying the loan with the CRDB Bank by both parties before the division of the sale proceeds obtained from the house. Failure to appeal, makes this court to believe that the appellant accepted the condition given by the trial court that before the division of the proceeds as ordered by the Court, the loan must be paid first.

It is also on records that, the only judgment which the appellant has appealed against is of Civil Case No. 14 of 2018. It is my considered view that, the trial court was right to find that, since the requirement of servicing the loan by the appellant was not fulfilled, the appellant cannot be entitled 50% before servicing the loan. The 50% which he is entitled, is after the loan has been serviced.

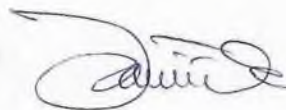
I hold so because, reading between lines the extract from the judgment of Matrimonial Cause No. 22 of 2014 as quoted above, it does

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not suggest that, the loan was to be paid by one party, that is the respondent. To the contrary, the plain and direct interpretation of the excerpt is that, the liability is for both, the appellant and respondent. And had the appellant been aggrieved by the decision especially the part of servicing the loan, he would have appealed against it, the action which he did not take. Now that the appellant did not appeal against it, he cannot deny to repay the loan before the division of the proceeds of the sale of the house at Olasiti kati.

In stressing on the trial court's findings which I find to be correct, I find the authority in the case of **Richard William Sawe vs Woitara Richard Sawe**, Civil Appeal No. 38 of 1992, the Court of Appeal of Tanzania held *inter alia* that;

"In ordering an equal division of matrimonial assets which included the house, the learned Judge said nothing about the responsibility to liquidate the outstanding part of the loan on the house. This was wrong and we believe that this was an unfortunate oversight on the part of the learned Judge. The parties should be made to participate not only in the division but also in the acquisition of the matrimonial assets in question."




In the light of the above exposition, the acquisition referred in the above extract include to redeem the property from the mortgage by servicing the loan. I find the first, second, third and fourth grounds of appeal to have no merit, and consequently to have failed. That said, the appellant has failed to prove his appeal, it is hereby dismissed with costs and the trial court's decision is upheld.

Order accordingly.

DATED at **ARUSHA** on 05th day of August 2022.




J.C. TIGANGA
JUDGE.