

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA
LAND APPEAL NO.74 OF 2021**

(Originating from Maswa District Land and Housing Tribunal in Land Application No.22 of 2019)

GEORGE SONA.....APPELLANT

VERSUS

SABINA VENAS LWELENJA..... RESPONDENT

JUDGEMENT

29th September, 2022 and

6th October, 2022

L. HEMED, J

At Maswa District Land and Housing Tribunal, hereinafter to be referred as "DLHT", **SABINA VENAS LWELENJA**, that first Respondent herein, instituted a suit *vide* Land Application No. 22 of 2019 to rescure three houses built on plot No. 509, Mekanisani street Lamadi which were about to be sold to recover Tshs 23,498,500/= the amount which was advanced by the Appellant one GEORGE SONA to LWELENJA M. NAGO the 2nd Respondent as a loan.

Before the trial Tribunal, it was not indispute that the Appellant and the 2nd Respondent had executed a Loan Agreement of Tshs 23,000,000/= where the suit premises were pledged by the 2nd Respondent as security to the said loan.

Having heard the matter the DLHT, found that the 1st and 2nd Respondents were wife and husband and that the suit premises were matrimonial property. The DLHT further found that the mortgage Deed was executed without the consent of the wife, the 1st respondent. It thus proceeded to nullify the said mortgage and permanently restrained the Appellant his agents, workmen or any person working for him from selling the suit premises or doing activities of similar nature.

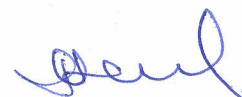
The 2nd Respondent herein was ordered by the DLHT to refund the Appellant the amount of money he borrowed. Aggrieved by the said decision of the DLHT, the Appellant knocked the gates of this Court with a MEMORANDUM OF APPEAL containing the following grounds: -

- "1. *THAT, the learned chairman grossly erred in law and fact by deciding in favour of the respondent without the existence of documentary evidence to support the facts that,*



the respondent and Lwelenja M. Nago jointly purchased a disputed/suit premise.

- 2. THAT, the learned chairman erred in law and facts by relaying on weak evidence which lacks any supportive evidence from the one (unknown person) who sold a suit land/premise to the respondent and Lwelenja M. Nago, the person witnessed it.*
- 3. THAT, the learned chairman erred in law and facts by nullifying the mortgage transaction properly entered by the appellant and Lwelenja M. Nago.*
- 4. THAT, the learned chairman erred in law and facts by nullifying the mortgage transaction entered between the Appellant and Lwelenja M. Nago without having clear or heavier evidence to prove the existence of the marriage between the respondent and Lwelenja M. Nago.*
- 5. THAT, the learned chairman erred in law and facts to record and consider some of the appellant's evidence which was very heavier than of the respondent."*



The Appellant is thus asking this Court to quash the decision of the DLHT and declare him the legal owner of the suit land/premises. On the hearing date, all parties appeared in person and argued for and or against the appeal orally. In their submissions parties could not argue the appeal sequentially, they made their submissions holistically.

The Appellant in his submissions stated that the trial chairman erred to decide in favour of the 1st respondent while she was not a part to the loan Agreement. According to the Appellant, the loan agreement was between the Appellant and the 2nd Respondent. It was also the submission of the Appellant that the 1st Respondent was not the wife of the 2nd Respondent. He stated that when the Loan Agreement was executed there was another Komanya who consented the mortgage.

He submitted further that the chairman of DLHT could not record some facts rather he considered false information which were made by the 1st Respondent. He finally asserted that the trial tribunal did not say anything on how to recover his money advanced to the 2nd Respondent.

In her reply submissions, the 1st Respondent stated to be the wife of the 2nd Respondent and that the suit premises were jointly acquired between



her and the 2nd respondent. She submitted further that the Appellant was negligent in making due diligence as to the ownership of the houses which were pledged as security for the loan advanced to the 2nd Respondent.

On his part, the 2nd Respondent averred that the 1st respondent is his wife as he married her in 1983 at Ukerewe and they are blessed with 11 issues. The 2nd Respondent admitted to have delayed in paying back the loan to the appellant. He stated the reason for the delay to be the sickness he encountered. According to him suffered from severe stroke that he was hospitalized at Bugando Hospital for longtime. He submitted to be ready to repay his loan.

In rejoinder submission, the Appellant repeated what he said when he was given chance to make submissions in chief.

I have examined all the five grounds and I can summarize them as follows, that the trial Tribunal erred to nullify the mortgage deed without proper evidence so to do.

In cases of Mortgage like the one at hand, where a spouse is alleging to have not consented to the transaction, the following must be proved: (a) that the said person is a spouse of the party who pledged the suit premises



as security; (b) the suit premise is jointly owned or matrimonial property;
(c) Whether the lender is licenced to engage in finance operations.

I have gone through the record of the DLHT which tried the matter and found that the 1st respondent who was the Applicant during trial testified as PW1 to the effect that she is the wife of the 2nd Respondent. The testimony of PW1 was supported by the evidence of PW2 one Mashimba Sangaoma who told the trial Tribunal that the 1st Respondent is the wife of the 2nd respondent herein. PW2 further testified before the DLHT that the suit premise was purchased jointly between the 1st and 2nd respondents as spouses.

Additionally, the 2nd respondent in his defense testimony before the DLHT admitted to be the husband of the 1st Respondent. In the circumstance, it was proper for the trial Tribunal to find that the 1st Respondent (the Applicant before the DLHT) was the wife of the 2nd Respondent.

Evidence on record show that the premise in dispute were jointly acquired between the 1st and 2nd respondents herein. It follows that the provision of section 59(2) of the Law of Marriage Act, Cap 29 ought to be complied with



by obtaining the consent of the other spouse before entering to a mortgage facility.

In the present case, there was no consent from the 1st Respondent who was found to have interests over the suit landed property. The court of Appeal cemented the provisions of section 59 of the Law of Marriage Act in various cases, such as in **Thabita Muhondwa vs. Mwango Ramadhani Maindo and another**, Civil Appeal No. 28 of 2012 (unreported) and in the case of **Idda Mwaka lindile vs. NBC Holding corporation and another**, Civil Appeal No. 59 of 2000 (unreported) that:

"under the law of Marriage Act, a spouse has a registrable interest in the matrimonial home..."

In his submission, the Appellant argued that the 1st Respondent is not the wife of the 2nd Respondent. He informed the court that the wife of the Respondent he knows was one mama Komanya who was present when the loan Agreement was executed. He notified the Court that she consented the loan agreement orally. This implies that even the said wife known to the Appellant did not consent the mortgage in writing. Spouse consent when one is creating mortgage on matrimonial property needs to be in writing. In



the absence of written consent, court will always consider that there was no consent at all. In the present case there was neither the consent of the 1st Respondent nor that of the "wife" known by the Appellant. In the premises, I hold that the trial Tribunal was justified to hold that there was no spousal consent to the purported mortgage.

Additionally, I have perused records of the trial tribunal to find out if the Appellant had proved before the DLHT to be the person licenced to engage in mortgage finance operations. In his evidence on record, nothing was adduced to that effect, hence adverse inferences have to be drawn against the Appellant that he was not licenced by the Bank of Tanzania to engage in mortgage finance operations. The Appellant was thus in contravention of Reg. 5 (1) of the Banking and financial Institutions (Mortgage Finance) Regulations, 2015, GN. No 254 of 2015. Which provides thus: -

"5(1) A person shall not engage in mortgage finance operations unless that person has a licence issued by the Bank."


Since the Appellant did not prove to be the licenced person to engage in mortgage finance operations, the mortgage entered between the Appellant and the 2nd Respondent was a nullity from the beginning.

From the foregoing, the fact that the purported mortgage was created without spousal consent, and the truth that the Appellant is not the person licenced to engage in mortgage finance operations, the mortgage deed cannot stand, it was a nullity from the beginning.


In the final analysis I find no merits in the appeal and is hereby dismissed in its entirety with costs.

DATED at **SHINYANGA** this 3rd day of October, 2022.




L. HEMED
JUDGE

The judgment is delivered this 6th day of October, 2022 in the presence of all parties appearing in person. Right of appeal fully explained.


L. HEMED
JUDGE
6/10/2022