

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT TABORA
LAND APPEAL NO. 20 OF 2020**

*(Originated from Misc. Land Application No.18 of 2018 Nzega District
Land and Housing Tribunal)*

HAILEN ERNEST NKEYA.....APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK PLC.....1ST RESPONDENT

DOLPHUIN GENERAL BUSINESS

ENTERPRISES CO. LTD.....2ND RESPONDENT

FELISTER MAGANGA CHONGOMA.....3RD RESPONDENT

AMANI TUMBU MNYENWE.....4TH RESPONDENT

JUDGEMENT

Date of Last Order: 12/12/2022

Date of Delivery: 15/12/2022

AMOUR S. KHAMIS, J:

National Microfinance Bank PLC (the **Mortgagee**) (Herein referred as 1st Respondent) advanced a loan to Mr. Amani Tumbu Mnyemwe @ Amani (the **Borrower**)(herein referred as 4th Respondent) whereby the title deed of matrimonial house was a security for the loan.

The Borrower defaulted on the loan, consequently the Mortgagee exercised its enforcement rights under the law to sell

the mortgaged property to Felister Maganga Chogoma (herein referred as 3rd Respondent) in order to recover the outstanding amount.

Hailen Ernest Nkeya (the **Appellant**) challenged the sale of the mortgaged property at the District Land and Housing Tribunal for Nzega (the **DLHT**) alleging, among other things, that she is the legal wife of 4th Respondent and her consent was not sought and obtained before creating a mortgage on their matrimonial property as is required by law. She therefore prayed for the DLHT to nullify the sale of the Mortgaged property.

Upon hearing the evidence of both parties DLHT found in favour of the respondents by dismissing the application alternatively declared the sale of the mortgaged property was legally conducted.

The Appellant being aggrieved by the said decision, she has lodged this appeal on the following grounds: -

- 1. That the trial Chairman of the Tribunal Land erred in law in making final determination of the case without directing /explaining an exactly amount of loan repaid and what was exact debt due.*

2. *That the trial Chairman of the Tribunal Land erred in law by violating the law relating to small mortgage like instant one which covers the maximum of three years and the applicant's debt had only 13 months to date of sell of mortgaged house.*
3. *That the trial Chairman of the Tribunal Land erred in law and fact in deciding that the appellant was not the lawful wife of the 4th respondent while she has lived as couple for more than 31 years blessed with 5 children, 3 grandsons. If parties lived together for the long time there is rebuttable presumption that, they are legally married.*
4. *That the trial Chairman of the Tribunal Land erred in law and fact in not paying due regards that there was no lawful consent by the spouse of the loan form the appellant.*
5. *That the trial Chairman of the Tribunal Land erred in law and fact by holding that there was spouse consent by the appellant though she was not the wife of the 4th respondent (the borrower).*
6. *That the trial Chairman of the Tribunal Land erred in law and fact in holding that IRENE ERNEST NKEYA and HAEILEN ERNEST NKEYA is the same person nevertheless HEILEN*

ERNEST NKEYA never appeared before bank and never signed spouse consent form of the said contract.

- 7. That the trial Chairman of the Tribunal Land erred in law and fact in not considering the principle of summary procedure in selling the mortgage property were fatal violated.*
- 8. That the trial Chairman of the Tribunal Land erred in law and fact by holding that the sale of the House NO. 146 Block P Nzega was legally concluded while the rules of summary procedure law were not concluded before sale contrary to the law. The estimated value was 50,000,000/= but the 1st and 2nd respondents fraudulently sold at cheap price at only 17,000,000/=.*
- 9. That the trial Chairman of the Tribunal Land erred in law and fact in not considering that there was no default of payment of debt as the 4th respondent(borrower) was in continuous repayment of the debt at new agreed rate of instalment to the date of attachment.*
- 10. That the trial Chairman of the Tribunal Land erred in law and fact by departing his tribunal assessors without giving reasons for his departure and referring to the superior court.*

11. *That the trial Chairman of the Tribunal Land erred in law and fact by not giving statutory notice before sale of the mortgaged house to the debtors and even never notified them the date of Auction hence resulting sustainable injuries to them.*

At the hearing of this appeal, the Appellant was represented by Mr. Sichilima, Learned Advocate, the 1st, 2nd and 3rd Respondents were represented by Mr. Isengoma, Learned Advocate and the 4th respondent was not represented.

Pursuant to the order of this court this appeal was argued by way of written submissions.

Mr. Sichilima Counsel for the Appellant argued that the provision of **Section 56 of the Law of Marriage Act, Cap 29 R.E. 2019** directs the quality of right of spouses. He argued that the appellant and the 4th respondent through their lifetime of Marriage they erected a house building situated at Ipili Nzega Township in Plot NO. 146 Block "P" in 2009. He alleged that the 1st respondent who met the 4th respondent in his office seeking for loan did not follow an equity of the contract upon spouses according to the law

of land. He referred this court to the case of **Hyde Vs Hyde (1986)**
I.R.I.P &D 130 where it was held that: -

“Marriage is an instrument of which said is more than any common contract made in transaction of business. Marriage is also an institution of which gave rights to those who are inn Matrimony as the common contract does in business, but in these aspects, Marriage is giving more power of statues than their living before the marriage and therefore the Christianity, Marriage in the world is understood that, is the voluntary union of a man and woman intended to last for their joint lives.”

Mr. Sichilima argued further that despite the fact that the Appellant during trial told the Tribunal that she is a legal wife of the 4th Respondent but the trial Tribunal went further and disposing an issue of marriage of the 4th Respondent in question.

He argued that the trial Tribunal was wrong to determine the case without showing the exactly amount of the loan repaid and what was an exactly debt due, hence it determined the case out of the issues reliable as to meet the good governance and law in society.

Mr. Sichilima also argued that the mortgaged house was sold to the 3rd Respondent at the lowest price without considering the value of the mortgaged and the period of repayment to such loan was in 13 months only, rather than expressly period in accordance to the law. He alleged that the loan advanced to the 4th Respondent was Tshs. 20,000,000/= and the 2nd Respondent sold the house to the 3rd Respondent at Tshs, 17,000,000/= he alleged that was lowest price.

He argued further that the contract made by 4th Respondent and 1st Respondent was badly in contract as it was beyond couple's contract. Because, the Appellant being a wife of the 4th Respondent did not sign in the said contract and productive of the Appellant's picture by the 1st respondent as a manager of the 1st Respondent does not prove as evidence that she was present at the time the contract was made between the 1st Respondent and 4th Respondent. He was of the view that it was the duty of the 1st Respondent to prove clearly that the document on which an Appellant was given was the same as the one given to the 4th Respondent and that they both bear the signatures of the spouses so as to meet the spouse's Contract on Mortgage as Requirement of Marriage Act, Cap 29 R.E.2019 under Section 59(1).

He also cite the case of **Silveri Vs. Theostina Rwekanika (1974) LRT NO. 30** and **Mtumwa Rashid Vs. Abdallaha Idd and Salum Omary in Appeal case No. 22 of 1993 (Unreported)** it was held that:-

'Hata Kamishina wa Ardhi akitoa kibali cha kuuza Nyumba ambayo ni mlai ya ndoa, Lakini wafunga ndoa hawakushauriana juu ya uuzaji wa Ardhi hiyo, basi sheria ya ndoa No5 YA 1979 Fungu 59 litatumika ambapo hukumu ya Mahakama Kuu ilitupiliwa mbali na kuamriwa nyumba iridi kwa wafunga ndoa na kurudishiwa fedha, mtu aliyenunua nyumba hiyo.'

Mr. Sichilima argued that the trial Tribunal did not consider the analogy of names of an Appellant herein of which gave some confusion to the trial Tribunal that, IRENE ERNEST NKEYA and HEILEN ERNEST NKEYA is same person who wrote even a letter to NMB PLC as the 1st Respondent requesting an assistance for replacement of payment of loan to the 4th Respondent and the letter was repudiated by an appellant that, she did not write any such letter, and thereby an Advocate for the Appellant's question

demanding the I.B Tracement of question, but trial Tribunal did not take drastic measure of such letter to I.B. for the opinion.

He also argued that the auction made on 20/4/2018 by the 2nd Respondent violated the provision of Order 35 of the Civil Procedure Code Cap 33 R.E.2019, it is argued that the 2nd Respondent did not follow the requirement under summary procedure which requires the plaintiff with a liquidated claim to the parties be made as an inventory in the form of an itemized list with the value showing the items attached and the value which the executing officer, place on each item.

Mr. Sichilima contended that the disputed land was sold by 2nd Respondent without consultation of the property value from valuer and hence he sold the disputed house at lower price of Tshs. 17,000,000/= while the value of the matrimonial house in dispute was Tshs. 50,000,000/= he argued that this was contrary to **Section 88(1) of the Civil Procedure Code Cap 33 R.E. 2019.**

He argued further that the trial Tribunal did not consider the total payment of the 4th Respondent has paid for the loan as to secure the mortgaged house while the 4th Respondent had

continuously paying of the debt even at new agreed rate of instalment payment of the date of attachment.

In response Mr. Ishengoma, learned counsel argued that the 1st ground of appeal is baseless as the Appellant has never raised the same during trial Tribunal nor disputed the fact that the 4th Respondent was indebted to the 1st Respondent for the loan taken by him rather the Appellant was disputing the fact that she has never consented on the mortgage of the dispute house.

He added that the amount indebted to the 4th Respondent is well stipulated under exhibit D2 which was tendered during trial at the trial Tribunal. Hence this ground lacks merit.

As to the 2nd ground of appeal, Mr. Ishengoma argued that it is undisputed fact that the 4th Respondent entered into the loan agreement with the 1st Respondent of which the 4th Respondent mortgaged his house. the 4th Respondent defaulted payment of the loan which was in equal twenty-four (24) months. He argued that during trial the loan agreement was tendered as exhibit D1 hence, the Appellant failed to substantiate her claim on the position of the law on the requirement of three years for small mortgage as raised as the ground of appeal.

Responding to the 3rd ground of appeal, Mr. Ishengoma contended that the trial tribunal has never disputed the fact that the Appellant was a wife of the 4th Respondent even though there was no evidence to that effect as the Appellant failed to call any witness to come and testify as she alleged to have contracted customary marriage with the 4th Appellant.

He argued further that the trial Tribunal considered the issue of presumption of marriage and went further to determine on whether the Appellant consented to the mortgage of the disputed house as this was well established by exhibit D1 the consent form which was witnessed by the Magistrate of Nzega Primary Court Ms. Hilda Ubona.

As to the 4th ground of appeal, it is argued that the consent of the Appellant was well obtained during the time of taking the loan as she signed the consent form and her picture was well inserted on that form which was tendered as exhibit D1 during trial.

He argued that the trial Tribunal considered that there was presumption of marriage as there was neither marriage certificate nor any witness to prove existence of customary marriage and took into consideration of the existence of spouse consent exhibit D1

which was well signed by the Appellant as it was tendered by 1st Respondent.

Responding to the 6th ground of appeal, Mr. Ishengoma contended that the Appellant is trying to take cover of the difference of the first name on her names to seek mercy o the court. It is submitted that during trial Tribunal she had never brought any substantive evidence to prove her names to be Heilen Ernest Nkeya as no even any certificate nor affidavit to prove her name hence this is an afterthought seeing her husband had consented on the loan taken by the names of Iren Ernest Nkeya.

Mr. Ishengoma responded on the 7th, 8th, 9th, 10th and 11th grounds of appeal altogether. He argued that the issue of summary procedure does not apply in this case as the case before this court is relating to the loan taken by the 4th Respondent and the terms and conditions are well stipulated in the loan agreement signed by both parties the 1st and 4th Respondents.

It is submitted that the terms of the agreement give the power to the Bank to have an automatic power to sell once the borrower had defaulted and the required procedures have been followed to auction and sell the mortgage property so as the bank can recover

its loaned monies. Reference was made to **Section 110(1) of the law of Evidence Act, CAP 6 R.E. 2019** which states that: -

“When the terms of contract have been reduced into writing, such document shall speak of itself.”

It is further argued that the said house was auctioned and sold on a public auction whereby the highest bidder purchased the suit house at the tune of Tshs. 17,000,000/= which was the market price of the said house at the time of auction hence the mere assumption by the Appellant that the said house was estimated at Tshs. 50,000,000/= is just a baseless as the appellant has no proof the existence of such valuation.

Mr. Ishengoma was of the view that all the procedures at the time of auctioning the suit house were followed this was proved by exhibit D2. He added that the Appellant was aware of the existence of the loan taken by 4th Respondent and consented to the mortgage of the disputed house. it is submitted that the Appellant had written a request letter to the 1st Respondent for extension of time to repay the loan and the same was tendered as exhibit D3 during trial.

It is also submitted that the trial Tribunal gave reasons for departing the opinion of the assessors. he argued further that the position of the law does not bound the trial Chairman to follow the opinion of the assessors.

In the end he prayed for the court to dismiss this appeal with costs for want of merit.

In his submission 4th Respondent argued that the trial Tribunal did not elaborate amount of loan advanced nor amount so far refunded and the amount due as debt, this indeed tainted the whole proceedings and hence the decision derived on uncertain money was quite unfair.

As regard to the consent of the Appellant the 4th Respondent argued that he was not aware of the said mandatory requirement of the spouse consent. He added that the loan officer did not instruct him to do so. That he was only told by the loan officer to bring the spouse's voter ID copy and her passport size photograph whereas he complied with and submitted them thereof to the 1st Respondent.

He argued that the Appellant was not involve from the beginning because she was against the loan. But she knew

everything after the loan repayment was worse due to economic drawbacks and bad business returns and she started effort of redemption of security and they were at the stage of cooperated in repayment.

The 4th Respondent argued that the value of the house was Tshs. 50,000,000/= hence the valuation report was very necessary before attachment and the sale the 1st Respondent and 2nd Respondent to the best reasons known to them opted to sell his house without valuation report to ascertain the real value of the property.

He also alleged that the sale was unjust and unlawful as there was modification instalment mutually agreed between the 1st and 4th Respondent but the 1st Respondent decided to embark on attachment and sale of the mortgage property while the 4th Respondent was paying the debt as to the new agreement.

He therefore prays for the court to nullify the sale of the mortgage property.

Having considered the submission fostered by both parties, grounds of appeal together with the entire record pertaining this appeal. I will start to determine the 1st, 2nd and 7th grounds of

appeal all together as the grounds raised are new issues that were not canvassed during trial Tribunal. Hence, this being an appellate Court cannot entertain a new issue which was not canvassed during trial. Since, the appellate courts do not take new evidence rather deals with the transcript on record. In the circumstance I find the 1st 2nd and 7th grounds of appeal to have failed.

In determining the 4th and 5th ground of appeal. The crucial issue is whether the mortgage of the suit property was proper in law. It is a cardinal principle that a spouse consent is a mandatory legal requirement that cannot be dispensed with when such a mortgage, like the one created in this case. **Section 114 of the Land Act** is in effect.

The import of this section is clarity and transparenence in a mortgage that involves a matrimonial property. It does not only create obligations to the mortgagor, but also the mortgagee. It also creates offences in case of breach. The law states as hereunder;

114.-(1) 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 is signed by, or there is evidence from the document that it has been assented to by the mortgagor and the spouses or spouses of the mortgagor living in that matrimonial home; or

(b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses living in that matrimonial home.

(2) For the purpose of subsection (1), it shall be the responsibility of a 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 a spouse.

(3) A mortgagee shall be deemed to have discharged the responsibility for ascertaining the marital status of the applicant and any spouse identified by the applicant if, by an affidavit or written and witnessed document, the applicant declares that there were spouse or any other third party holding interest in the mortgaged land.

(4) An applicant commits an offence who, by an affidavit or a written and witnessed document, knowingly gives false

information to the mortgagee in relation to existence of a spouse or any other third party and, upon conviction shall be liable to a fine of not less than one half of the value of the loan money or to imprisonment for a term of not less than twelve months.

It is therefore trite that the law imposes a duty to the mortgagor to disclose that the property subject of mortgage is matrimonial or some other person have interest in it.

It also imposes a duty to the mortgagee to do some kind of due diligence in order to know that the land subject of the mortgage is not with shared interest.

In the instant case there is no dispute that the Appellant is the wife of the 4th Respondent. Their marriage was subsisted when mortgage was created. The appellant alleged that, she did not take part and was not informed about the same.

Her allegation was also supported by the 4th Respondent, who submitted that his wife was not aware of the said mortgaged and that he took the loan without involving his wife.

He also contended that his wife was involved when the situation became worse when he suffered financial constraints so

he decided to inform his wife about the loan he took from the 1st Respondent.

He added that he was advice by loan officer to submit his wife's identity card and passport size photograph. He submitted that he did not know that requirement of spousal consent until he was told by the loan officer.

In my observation I find the submissions of the Appellant together with that of the 4th Respondent are just an afterthought which has been taken by event. I am holding so because, I have examined exhibits D1 the loan agreement between the 4th and 1st Respondent and the consent forms No 20 shows that the Appellant consented. It is tragic that the photo and signature of the spouse consent are present in the record. The same was verified by the notary public one Hilda Ubona at Nzega Primary Court.

The signature has been denied by the Appellant and so the alleged attestation Officer have never been called to testify to that effect.

I am tempted to believe that if indeed the Appellant did not send the photos to the bank and sign the consent form, then her husband did. There is no evidence to prove that she was not aware of the transactions. I do not see the possibility, in this case for 1st

Respondent to move on his own, forge Appellant's signature, crop her photos and attest the same before the commissioner for Oath, who also without question attested the same, then place it in the mortgage deed, bind the same, approve it in order to advance the loan to the 4th Respondent without his knowledge or his wife.

Having said what I have said, it is important to note that the Appellant was required under the law to prove that the same was not her signatures as under section 110 of the Evidence Act. She could have attempted to call the Commissioner for Oath alleged attested her consent.

For the foregoing reasons, I am satisfied that the 4th and 5th grounds of appeal is baseless for want of merit.

Likewise, the Appellant denied that she is not Irene Ernest Nkuye as appeared in the spouse consent, she alleged that her name is Heilen Ernest Nkuye. However, the Appellant has failed to prove her allegation to the balance of probability that she is Heilen and not Irene.

Having going through the record, I have not come across any documentary evidence which proves the allegation fostered by the Appellant that denies the name of Irene Ernest Nkuye which appears on the spouse consent which was tendered by the 1st

Respondent during Trial. In absence of any documentary evidence this court find the 6th grounds to have no merit.

As to the 8th, 9th, 10th and 11th grounds of appeal, I wish to join hands with the submission of Mr. Ishengoma, Learned counsel for the 1st 2nd and 3rd Respondents and hold that the grounds lack merit. Because the issue of summary procedure does arise in this case. The record shows that the Appellant was aware of the sale of the disputed house through auction conducted on 20/4/2018. At page 11 of the typed proceedings the Appellant when cross examined by Mr. Ishengoma stated that and I quote: -

" I heard the Public Notice on 17/4/2018 that the house is on sale on 20/4/2018 but on that date of public auction I was not there."

With this piece of evidence, it is quite clear that the Appellant had knowledge of the sale of the mortgage property. The evidence on record shows that the house was sold in Public Auction and the 3rd Respondent was the highest bidder. I therefore disagree with the Appellant's submission that the house was sold at the lowest price since there was no proof to that effect.

It is my settled view that the sale was proper since there was a default in loan payment. Therefore, bank was right to realize its

money through attachment of sale of the mortgaged house. Since the 4th Respondent had breached his contractual obligation. The allegation that the mortgaged property was sold at the lowest price is an afterthought. In the circumstances I find the 8th 9th ,10th and 11th grounds of appeal to have no substance.

In the upshot, I find that the decision of the DLHT was proper and I do not see any fault to disturb the said decision. That being the case, I hereby dismiss this appeal with no order for costs.



AMOUR S. KHAMIS.

JUDGE

15/12/2022

ORDER

Judgement delivered in open Court in presence of Mr. Timothy N. Sichilima, learned advocate for the appellant who is also present and in presence of the fourth respondent. The first, second and third respondents are absent.

Right of Appeal is Explained.



AMOUR S. KHAMIS.

JUDGE

15/12/2022