IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

LAND APPEAL NO. 148 OF 2021

(Originating from the Judgment and Decree in Land Application No. 05 of 2019 before the District Land and Housing Tribunal for Kilosa, at Kilosa dated 28th day of June, 2021)

ZAWADI ALLY TWALIKI .....APPELLANT

VERSUS

MOHAMED MUSSA KITAKO ..... 1ST RESPONDENT

NATIONAL MICROFINANCE BANK..... 2ND RESPONDENT

GADAU AUCTION MART AND CO. LTD ..... 3RD RESPONDENT

JUDGMENT

31st August, 2022

CHABA, J.

The appellant in this matter is seeking to challenge the decision and decree of the District Land and Housing Tribunal for Kilosa, Kilosa (the Tribunal) in a case in which the appellant was objecting the attachment and sale of the two houses with residential licences namely, SQT/MG.K/12 and SQT/DL/68 located at Magomeni Kihangahanga and Mtongolo Dumila, respectively within the District of Kilosa for outstanding loan, claiming that the two houses are associated with matrimonial properties.

The first respondent secured TZS. 50,000,000/= as loan from the second respondent and mortgaged the named houses, while swearing an affidavit that he was not married and no other person had any interest in the

mortgaged property. According to the loan agreement, he was required to repay the loan within twelve months from 06/09/2018 to 06/08/2019. But he paid only one instalment of TZS. 4,655,688.69/=, and afterward defaulted. After several reminders and a number of condonations in vain, the second respondent opted to exercise her rights over the mortgaged property where she assigned the 3rd respondent to perform her duty by effecting attachment of the mortgaged property and sale it in accordance with the law.

The appellant who claimed to be a legal wife of the 1st respondent, contended that she was not consulted and has never allowed and or even give her spouse consent to mortgage the house. She averred that, the said houses being joint matrimonial properties, the attachment and sale should not be conducted and the agreement between the 1st and 2nd respondents be nullified.

The Tribunal having adequately heard both parties, it proceeded to dismiss the application and awarded costs to the 2nd and 3rd respondents. Dissatisfied, the appellant preferred this appeal armed with six (6) grounds of appeal as hereunder: -

1) *That, the trial tribunal erred in law and fact in finding that the applicant's application was not proved to the required standard while the appellant proved that she is interested in the houses which were used as collateral without her knowledge.*

2) *That, the tribunal erred in law and fact for failure to consider the 1st respondent loan was insured by the insurer best known by the 2nd respondent.*

3) *That, the trial tribunal erred in law and in fact for disregarding the appellant's evidence and that of her witness which established and proved how she had interest in the suits land. In other words, the evidence adduced by the appellant herein established and proved to the required standard that she is the owner of the disputed land.*

4) *That, the trial tribunal erred in law and in fact for failure to visit the locus in quo.*

5) *That, the trial District Land and Housing Tribunal erred in law and in fact for basing its decision on matters not raised and submitted by the respondents herein.*

During hearing of the appeal, the appellant was represented by Mr. Derick Vicent, learned advocate, the 1st respondent appeared in person and unrepresented while the 2nd and 3rd respondents enjoyed the legal services of Mr. Jackson Liwewa, learned advocate. The appeal was conveniently scheduled to be argued and disposed of by way of written submissions. All parties complied with the court's scheduled orders.

Submitting in support of the first ground, Mr. Derick Vicent averred that the appellant proved to the required standard that she was married to the 1st

respondent in 2017 and a marriage certificate was tendered to prove the fact (Exhibit PE.1). He stated that, the matrimonial properties acquired in their joint life were mortgaged without her consent under section 59 of the Law of Marriage Act [Cap. 29 R. E, 2019] and sections 161 (3) and 114 (1) (a) and (b) of the Land Act [Cap. 113 R. E, 2019]. In view of the above, the learned advocate highlighted that, the trial Tribunal erred to order the mortgaged properties be sold. He cited the case of **Materu Leison and J. Foya v. R, Sospeter [1988] TLR. 102** to persuade this first appellate court to interfere with the finding of the tribunal.

On the second ground, the appellant's complaint is that the 2nd respondent was not entitled to recover debt by attachment and sale of the property in dispute because the loan entered by the 1st respondent was insured. According to him, the insurer was bound to clear the debt since the 1st respondent failed to repay the loan due to fire accident which destroyed the grain purchased by the 1st respondent using the monies, he obtained from the 2nd respondent as loan facility. The learned advocate referred this court to paragraph 6 of the loan agreement which had the insurance clause.

As regards to the third ground, Mr. Derick went on to argue that, the evidence adduced by the appellant and her witnesses was not evaluated by the trial Tribunal. To reinforce his argument, he cited the cases of **Mkulima Mbagala v. R,** Criminal Appeal No. 267 of 2006 (Unreported) and **Hemedi Saidi v. Mohamed Mbilu [1984] TLR 113.** Linking the above precedents

with the evidence adduced by the appellant, Mr. Derick submitted that it is clear from the trial tribunal's record that PW3, PW4 and DW3 respectively, all elaborated how the appellant was seen in the disputed land and developed the same during substance of her marriage and the 1st respondent. He submitted further that, though the evidence adduced by the appellant and that of the 1st respondent could not tie, but the evidence adduced by the appellant was heavier than the testimony advanced by the 1st respondent.

In respect of the fourth ground, the appellant's complaint is that the trial Tribunal erred both in law and fact for failure to visit the locus in quo. On this facet, Mr. Derick endeavoured to please this court to accept his argument that failure by the trial Tribunal to visit the said matrimonial houses (mortgage houses) which are the subject of this appeal did amount to injustice because by so doing, the trial Tribunal would have an opportunity to ascertain whether the disputed houses were matrimonial properties / houses. To buttress his contention, he cited the case of **Avit Thadeus Massawe v. Isdor Assenga,** Civil Appeal No. 06 of 2017, CAT at Arusha Registry.

On fifth ground, it is the appellant's complaint that the trial Tribunal erred in law and fact for basing its decision on matters not raised and submitted by the respondents. To substantiate his argument, the learned advocate underlined that the issue of matrimonial properties was not raised but the trial Tribunal discussed it at p. 12 of its judgment and the appellant was not afforded her rights to be heard. He cited the case of **Charles**

Christopher Humphrey Kombe v. Kinondoni Municipal Council, Civil Appeal No. 81 of 2017 (Unreported) to fortify his argument.

Basing on the above submission and precedents, Mr. Derick prayed the court to quash the trial Tribunal's judgment, decree and proceedings with costs.

Coming to the 1st respondent's submission, in a bid to raise good defence he contended similar and material particulars submission to the ones submitted by the appellant. Indeed, the 1st respondent supplemented the appellant's submission in every aspect. For convenience purposes, I will refer it in the course of determining this matter whenever need arises.

On his part, Mr. Jackson Liwewa, learned advocate who entered appearance for the 2nd and 3rd respondents countered the appellant's submission by submitting in seriatim. At the outset, he contended that the first ground has no merit. To substantiate his contention, Mr. Liwewa averred that the requirement of consent by spouses is provided under section 112 (2) of the Land Act [Cap. 113 R. E, 2019] where the law says; "matrimonial home" means the building or part of a building in which the husband and wife ordinarily resides together. He said, it means that spousal consent in mortgage is required in house where the mortgagor and his/her spouse live. He accentuated that, the requirement of spousal consent is found under section 114 (2) of the Land Act (Supra) which imposes an obligation for the mortgagor (borrower) to disclose that he or she has spouse, and upon

disclosure mortgagee has to take reasonable steps to verify the marital status of the mortgagor. The law says:

> *"Section 114 (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".*

Reasonable steps stated under section 114 (2) of the Land Act has been clearly interpreted under section 114 (3) of the Land Act (Supra). The law provides that:

> *"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 spouses or any other third-party holding interest in the mortgaged land".*

From the wording of the above provision of the law, Mr. Liwewa emphasized that the law requires the mortgagee to discharge his obligation either by an affidavit or written and witnessed documents declaring his or her marital status (whether married or not). He continued to submit that, in the present

appeal, there is an affidavit of the 1st respondent who signed before the 2nd respondent stating that at the material time he had no wife (spouse), or any other third-party holding interest in the mortgaged property (Exhibit DE.6). With this piece of evidence, the learned advocate avowed that by virtue of section 114 (3) of the Land Act (Supra), the 2nd respondent discharged her duty in accordance with the law. He added that, section 114 (4) of the Land Act creates an offence for any person who gives false information to the mortgagee in relation to the existence of a spouse. The law provides that: -

> *"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".*

He rounded up by underlining that the allegation that consent in a mortgage was not obtained, such a contention is devoid of merit because as hinted above, the 2nd respondent discharged her duty in line with the provisions of section 114 (3) of the Land Act.

Contesting on the second ground, Mr. Liwewa submitted that parties to the suit are bound by their own pleadings. He stated that, looking at the appellant's pleadings before the trial Tribunal, it shows that the 1st respondent

did not plead any fact indicating that he was insured (means the issue of insurance was not pleaded at all), nor proof of fire was established. He emphasised that indeed, there was no proof of fire that it was occurred. To bolster his argument, he referred this court to the case of **James Funke Gwagilo v. AG,** Civil Appeal No. 67 of 2001, CAT, Dar Es Salaam (Unreported). He stressed that, since there is no such pleadings, the court is barred from deliberating and determining an issue not pleaded by parties. He asserted that, this position of the law was held in the case of **Juma Jaffer Juma v. Manager PBZ and Two Others,** Civil Appeal No. 07 of 2022 CAT (unreported).

As to the third ground, the learned advocate replied that, it is trite law that the court of law is guided by the law and rules of evidence. He submitted that the law of evidence under section 110 (1) & (2) of the Evidence Act [Cap. 6 R. E, 2022] requires that, whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist, and the burden of proof lies on that person.

Reverting to the evidence adduced at trial, the learned advocate underlined that the evidence adduced by the appellant/applicant was just mere words and had no any support from documentary evidence to back up her claim. On the contrary, his clients tendered Exhibit DE.4 (Mkopo), Exhibit DE.5 (Hati ya Kibali (Leseni) Cha Ujenzi, official search), and Exhibit DE.6

(Divorce paper, Affidavit). All these exhibits proved and justified his clients' action. To cement his contention, he referred this court to the case of **Hemedi Saidi v. Mohamed Mbilu.** He continued to highlight further that, since there was ample evidence to support the claims advanced by the 2nd respondent, the trial Tribunal was right to arrive at her decision. He placed reliance on the case of **Kansius Marwa v. R, [2017] TLS LR. 377**, to reinforce his argument.

Countering to the fourth ground, Mr. Liwewa accentuated that there is no law which requires the court or tribunal to conduct a visit at the *locus in quo.* He contended that, it is the discretion of the court or tribunal to visit the same in particular when it is necessary to verify the evidence by the parties during trial. This position of the law was enunciated in **Sikuzani Saidi Magamba and Another v. Mohamed Roble,** Civil Appeal No. 197 of 2019, CAT (Unreported). He asserted that, in the circumstance of this case, there was no necessity to visit locus in quo as the major issue was; *"Kama nyumba zinazogombaniwa ni mali ya familia", meaning - whether the disputed houses were matrimonial properties.* On this ground, Mr. Liwewa submitted that the fourth ground of appeal lacks merit.

On the fifth ground, the learned advocate contended that, the argument advanced by the appellant that; *"the issue of matrimonial property was not raised earlier on, during hearing of the case but, the trial tribunal discussed it as exhibited at paragraph 2 - 4, at p. 12 of the typed judgment"*, Mr. Liwewa

avowed that the same has no legal base because it is apparent on record that such a statement is nowhere to be seen. Again, this ground has no merit.

He concluded that, basing on the authorities cited, the strength of the foregoing arguments, reasons, and cumulative effect of what he has submitted, he prayed the court to dismiss the appellant's appeal with costs on the ground that this appeal is totally without merits.

In rejoinder, Mr. Derick submitted that, since the 2nd and 3rd respondents do not dispute the issue of requirement for spousal consent when the 1st respondent secured a loan from the 2nd respondent on the basis of matrimonial properties (houses) as collateral as provided under sections 112 (2) of the Land Act and the obligation imposed on the side of the mortgagor as stated under section 114 of the same law, then the appellant's grounds of appeal have merits. He referred this court to the case of **Tanzania - China Friendship Textile Co. Ltd v. Our Lady of The Usambara Sisters [2006] TLR. 70** and reiterated that the mortgagee had the duty to take reasonable steps to verify whether the applicant for a mortgage had (has) a spouse or not as required by the law under section 114 of the Land Act. On the strength of his submission, he prayed the court to quash all proceedings, the judgment and expunge from the record Exhibit DE.6 and allow the appellant's appeal.

As to the question whether parties to the suit/case are bound by their own pleadings, Mr. Derick submitted that, the 2nd and 3rd respondents were

firstly supposed to look at the terms of their contract. He averred that, the 2nd respondent did not adhere to the terms of their contract because the 1st respondent reported and explained to the 2nd respondent what made him to default servicing his loan. In **Lulu Victor Kayombo v. Oceanic Bay Limited & Another**, (Consolidated Civil Appeals 22 of 2020, 155 of 2020) [2021] TZCA 228 (07 June, 2021), the Court observed that: -

> *"It is common knowledge that parties to contract are bound by the terms of contract. Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which the parties have agreed between themselves ... it is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute."*

Basing on the above holding of the Court of Appeal of Tanzania, Mr. Derick was of the view that, the 2nd respondent did not follow the terms of their contract in respect of coverage of the damages occurred to the 1st respondent after the grains were burnt with fire. Therefore, the contention that parties are bound by their own pleadings has no place.

Mr. Derick ended to submit by underlining that basing on the premises of the foregoing submission, and for the interest of justice, he prayed the court to allow the appellant's appeal.

Having considered parties' rival submissions for and against the present appeal, and upon carefully scrutinised the trial tribunal's record, and the exhibits tendered at trial, I find it apt to start by commending the learned advocates for industrious research and legal submissions. I acknowledge them all even if I might not be able to refer to all precedents cited.

In determining the merits of this appeal, I propose prefer to treat the 1st and 3rd grounds jointly, for they all raise the same issue that is whether the appellant proved to the required standard her interest in the houses concerned.

I take as the correct position of the law as to what the parties have made refences in their respective submissions. They both stated the evidential burden and standard of proof in civil cases stipulated under sections 110 and 111 of **The Evidence Act [Cap. 6 R. E, 2019]** also the position of the principle of law in **Hemedi Saidi v. Mohamedi Mbilu** (Supra) which ruled that the court will weigh the evidence of the two parties and make findings in favour of the one with stronger evidence.

To resolve the most important point at issue, I vote to point out first the conceptual issue of what is proof on balance of probability. To begin with, I am persuaded by the decision of the House of Lords who underscored and defined the word standard of proof through the ruling delivered by Lord Hoffmann to which Lord Baroness Hale concurred in the case of **Re B (Children) [2008] UKHL 35.** It was held: -

If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

The Court of Appeal of Tanzania in the case of **Mathias Erasto Manga v. Ms. Simon Group (T) Limited,** Civil Appeal No. 43 of 2013 (Unreported) it had an opportunity to address the issue of standard of proof, wherein it observed that: -

"The yardstick of proof in civil cases is the evidence available on record and whether it tilts the balance one way or the other".

In another case of **Jasson Samson v. Novatus Rwechungura Nkwama,** Civil Appeal No. 305 of 2020, CAT, at Bukoba (Unreported), the Court while referring with appreciation to the case of **Miller v. Minister of Pensions [1937] 2 All ER 372,** it held that: -

"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in criminal case."

In an attempt to discharge the duty in accordance to the afore-mentioned standard of proof, the appellant tendered Exhibit PE1, which is named as "CERTIFICATE OF MARRIAGE" issued by the National Muslim Council of Tanzania which purported to officiate marriage between the appellant ZAWADI ALLY TWALIKI and MUHAMEDI MUSSA KITAKO on 07/08/2017. Upon reviewing and referred to Part I and II of the Law of Marriage Act, [Cap. 29 R. E, 2019], I have found that Exhibit PE1 did not qualify to be proof of marriage neither under the Land Act (Supra) nor the Law of Marriage Act (Supra). I hold this position in respect of Exhibit PE1 because it did not qualify in the parameters set by the law to be evidence of marriage as asserted by the appellant. I may add, even the paper (Exhibit DE6) purported to be divorce to one FATUMA the former wife of the first respondent had no legal

effect for having been issued by an unauthorised person as I have ruled in respect of an Exhibit PE1. Section 55 of the Law of Marriage Act (Supra) which is a guiding principle of law, provides for the proper evidence that is admissible in court as proof of marriage in the following words: -

> *"Section 55 - The following documents shall be admissible in evidence without proof in any court or before any person having power under any written law to receive evidence, as being prima facie evidence of the facts recorded therein: -*
>
> *(a) a marriage certificate issued under this Act or any law in force before the commencement of this Act;*
>
> *(b) a copy of such marriage certificate purporting to be certified as a true copy by the registrar having custody of the original;*
>
> *(c) an entry in any register of marriages kept under this Act or any written law heretofore in force;*
>
> *(d) a copy of an entry in any such register purporting to be a true copy so certified by the Registrar-General or the registrar having custody of the register;*
>
> *(e) a copy of an entry in a return sent to the Registrar-General in accordance with section 46, certified by the Registrar- General to be a true copy of such entry;*

(f) an entry made, prior to the coming into force of this Act, in any register of marriages maintained by the proper authority of the "Baraza Kuu la Waislamu wa Tanzania" (BAKWATA), the Shia Ith'nasheri, the Shia Imami Ismaili, the Bohora or any other community or a copy of any such entry certified by a proper officer of that authority to be a true copy; and

(g) in relation to a marriage celebrated in a place of worship at a time when the official registration of such marriages was not required, an entry in any register of marriages kept by the proper authority of the religion concerned or a copy of any such entry sealed with the seal, if any, of that authority and certified under the hand of the registrar or other proper officer of that authority to be a true copy."

With the evidence adduced by the appellant before the trial tribunal, I am satisfied in mind that the appellant did establish what in law is termed as cohabitation and not valid marriage. On this facet, I am also of the view that, I think even the trial tribunal missed a point when relied upon Exhibit PE1 as evidence of marriage. Now, looking at the evidence adduced by the second respondent and other defence witnesses, it is apparent on record and positively as well that, all established that the second respondent swore an affidavit stating that the mortgaged properties were his personal property(ies)

and no other person had interest therein. The first respondent himself testified that, he swore the said affidavit and the same was presented before the second respondent for securing a loan.

From the foregoing, I am satisfied that the second respondent discharged all his duties in respect of the law on mortgage, and the agreements between the two were valid in all aspects. Apart from requiring the first respondent to declare, the second respondent through her own initiative caused to conduct the relevant evaluation and finally tendered the report before the trial tribunal through DW2 where the said report was admitted and marked as Exhibits DE7 collectively. As regards to grounds 2 and 3, I would agree with the trial tribunal that the appellant failed to prove her case on the balance of probability. She was required to prove that she is a spouse of the first respondent, but she failed to establish to that effect. Again, she was duty bound to prove that at the material time she had some interest in the mortgaged property and that the second respondent accepted the mortgage without reasonable steps. But, as I have hinted above, all these facts were not proved.

Moreover, the proposition by the appellant and the first respondent that the agreement entered by the parties had elements of illegality, in my considered opinion, this assertion is unacceptable. I say so because, under the provision of section 114 of the Land Act (Supra), a mortgage of matrimonial home shall be invalid if, despite of being signed by the

mortgagor, has not been signed by a spouse or has not been consented by the spouse. The mortgagor bears the duty to disclose whether he/she has a spouse or not and the mortgagee is tasked to take reasonable steps to verify the marital status as alluded to above. But as to what amounts to reasonable steps, is stated under the subsequent provisions. I have fully considered the provisions of section 114 of the Land Act. However, my concern is on subsections (3) and (4) which states that: -

> *"Section 114 (1) – NA;*
>
> *(2) NA;*
>
> *(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 was spouse or any other third-party holding interest in the mortgaged land."*

In my view, the second respondent acted in accordance with the law, and the first respondent also declared accordingly that he had no spouse and the mortgaged property had no third party interest. The question that arises in mind is, why the first respondent swore or deponed an affidavit as hinted above and later on, came up with a different version of story insisting that he was actually married and himself prayed the tribunal/court to nullify the

agreement or otherwise relieve him and his purported spouse from the responsibility? In the circumstance of this case, no doubt that any evidence adduced by the first respondent would not be acceptable if the law is followed. I am holding this position because, the law is clear that his statement is inadmissible under the doctrine of estoppel which is provided under section 123 of the Evidence Act [Cap. 6 R. E, 2019] which provides that: -

> *"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing".*

Based on the above principle of law, I may also add that, not only the second version of the first respondent's statement would not be accepted, but also, he may stand before the court of law and charged with the criminal offence and if so convicted, can be ordered to pay fine or in default thereof be sentenced under sub-section (4) of section 114 of the Land Act (Supra) which provides that: -

> *"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."

As shown above, and taking into consideration all the facts that were not in disputes in respect of the relationship between the appellant and the first respondent, in the circumstance, the second respondent was perfectly correct on the steps she adopted to recover the debt. On the other hand, the trial tribunal based on her findings, reasoning and the grounds stated in the impugned judgment was correct to arrive to her decision, except on Exhibits PE1 and DE6. Having so analysed, I uphold the decision of the trial tribunal on this issue, but with a slight difference in reasoning as shown above. In view of the above, grounds 1 and 3 are altogether dismissed.

The second ground is devised on the contention that, the first respondent's loan was insured by the insurer known to the second respondent and hence the second respondent was not entitled to recover the loan. While the first respondent claimed that he failed to repay the loan because of the fire disaster that hit his grain gallery, on the other hand, the second respondent upon visiting the locus in quo she revealed that the alleged calamity of fire, was cooked story and forged event. The incident was reported to the nearest police station and a criminal case no. 1269 of 2018 was filed accordingly. When the police officers mounted investigation, they

were satisfied that there was no any incident occurred in connection with the calamity of fire that caused damages as alleged by the 1st respondent which fits for compensation within the insurance policy that covered his loan.

From the above obsevation, I find it appropriate to deal with the issue of insurance clause. At page 3 of the Exhibit DE4 (Loan Agreement) in particular Clause 6 (C), the same has been couched in the following words: -

> *"Pia mkopaji atakatwa kwa mara moja 0.5% pamoja na VAT ya mkopo wake kwa mwaka kwa ajili ya bima ya moto na wizi wa kutumia nguvu kwenye biashara na bidhaa alizokopea mkopo. Mkopaji atafidiwa kulingana na hasara aliyoipata, fidia haitazidi kiwango cha mkopo uliowekewa bima. Pia bima haitafidia hasara itakayotokana na upotevu/wizi wa pesa au/na vocha za muda wa hewani au/na simu".*

From the above excerpt, it means that the borrower shall have a deduction of 0.5% and VAT of his loan per annum to cover insurance in cases of fire outbreak and robbery that may occasion on the business. That, in cases of contingent event, the borrower shall be compensated according to the loss suffered but not exceeding the amount of loan insured.

According to the second respondent, the insurer declined to cover the incident of fire on a good ground. The second respondent suggests that the incident was staged. As indicated above, the police officers as well are said to

have suspected that the incident was not genuine, and the first respondent did not tender any report from a competent authority regarding the fire outbreak. Truly, there was no report or any necessary information regarding the source and nature of the disaster, extent and estimation of loss occasioned by the purported calamity of fire or disaster.

Apart from the above findings, I have further observed from the pleadings at pages 1 - 3 of the application that, the applicant did not raise the issue of insurance cover anywhere. No wonder, even in framing the controlling issues, the aspect of insurance was not raised. The principle that parties are bound by their own pleadings is still alive and deserves homage. This court is as well obedient to that rule. It has been followed and provided in several cases of this court and the Court of Appeal of Tanzania that parties and courts are not allowed to go outside the respective pleadings unless there is a good ground and adherence to the relevant procedures. In the case of **James Funke Gwagilo v. Attorney General [2004] TLR 161** the Court of Appeal of Tanzania perfectly underscored the principle and the rationale of the rule was observed by the Court in the following words: -

> *"The function of pleadings is to give notice of the case which has to be met. A party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issues*

on which the Court will be called upon to adjudicate to determine the matters in dispute."

In the present appeal, not only the appellant did not raise the matter or such a concern in her pleadings, but also, she was not a party to the insurance agreement. Assuming she was a party or had the right in the agreement, another snag is that the agreement itself did not contain any term implying that the insurer would cover the outstanding debt in case of fire outbreak. My understanding from the afore-stated clause is that the insurer would compensate the mortgagor for the loss that would be occasioned by fire outbreak/calamity of fire in the goods that were bought by the loan money. I do not think that the insurance clause from its wording intended to relieve the first respondent from satisfying the outstanding debt in the present situation.

This Court in the case of **LETSHEGO Bank (T) Ltd v. Mwangasa Agness and Another,** Civil Appeal No. 04 of 2021, HCT, at Mbeya (Unreported) was faced with a similar situation. Upon deliberation of the matter, it ruled inter-alia that: -

"Upon appraising the pleadings there is nowhere the 1st respondent pleaded illegality or otherwise of clause 8.2.3 of the loan agreement she had entered with the appellant. Moreover, there is nowhere the 1st respondent claimed the loan to be repaid through insurance cover, even issues which were framed had no bearing on

clause 8.2.3 of the loan agreement... To my understanding, the condition was set to give assurance that the occurrence should be naturally and not self-motivated. It has to be noted that the 1st respondent adduced no evidence to show the source and cause of the outbreak of fire and that the situation was rescued by people or authorities concerned so as not to affect her neighbours. It was upon the 1st respondent to lead evidence to show that the fire occurred as force majeure as contained in the contract".

In this appeal, the trial tribunal had no room or avenue through which to rule in its decision basing on the insurance clause for the following reasons: - **First;** That the appellant did not plead in her pleadings, **Second;** She was not party to the insurance agreement, **Third;** the agreement was not meant to cover the outstanding loan which was due to the first respondent. The argument that the second respondent would have recovered her debt from the insurer has/had no basis and of course this is a new fact at this first appellate stage. For these reasons, I find that this ground of appeal has no merit.

Coming to the fourth ground, the appellant wants this court to fault the trial tribunal's decision on the ground that it did not visit the *locus in quo*. She submitted that, the trial tribunal was duty bound to visit the said home and get the neighbours to narrate on who occupied and owned the said

properties. I think this argument defies the rule of evidence in respect of burden of proof. This court has pondered much if it could be possible for an umpire to take such course and maintain impartiality. But if there were neighbours to testify any fact it was the appellant's duty to present the said neighbours before the trial as her key witnesses. In the instant appeal, the relevant issue was whether the said houses were matrimonial houses or not.

I have asked myself, was it necessary to visit the houses to rule on the issue? The law is settled that visiting *locus in quo* can be preferred only in exceptional cases and when necessary. The purpose and rationale, manner and things to consider were well discussed in the case **Avit Thadeus Massawe v. Isdor Assenga** (Supra), cited by Mr. Derick, learned advocate for the appellant. With due respect to the learned advocate, I think the significant guidance deliberated in this case (decision) appears to have been escaped from his mind of counsel's grip. In my understanding, the Court of Appeal in the case of **Avit Thadeus Massawe** (Supra) warned that *locus in quo* should be visited only when it is necessary. In this case, the disputes involved among other things, location of the disputed land (See page 10 of the typed judgment). Whereas, one party claimed the land to be on Plot No. 16, the other party contended that it was on Plot No. 17. In a situation like this, where there was conflicting evidence, it was necessary for the court to visit the *locus in quo.* Citing the case of **Nizar M. H. v. Gulamali Fazal Jan Mohamed [1980] TLR 29** and adopting the ruling therein, the Court

cautioned that visiting locus in quo should be resorted to only when it is necessary and with caution: -

> *"It is only in exceptional circumstances that a court inspects a locus in quo, as by doing so a court may unconsciously take on the role of a witness rather than an adjudicator. At the trial, we ourselves can see no reason why the magistrate thought it was necessary to make such a visit. Witnesses could have given evidence easily as to the state, size, location and so on of the premises in question."*

As shown above, it is my considered view that, under the circumstances of this case, it was not necessary for the trial tribunal to visit the *locus in quo*, as correctly submitted by the respondent's counsel in line with the decision of Court of Appeal of Tanzania in the case of **Sikuzan Saidi Magambo & Another v. Mohamed Roble** (Civil Appeal 197 of 2018) [2019] TZCA 322 (01 October 2019) [Extracted from Tanzlii]. Moreover, it was not the trial tribunal's duty to ask the appellant's neighbours as who was the rightful owner of the houses. The question of ownership was positively established by the parties themselves and the crux of the matter was whether the properties were matrimonial based or not, as indicated above.

In my view, the need to visit the *locus in quo* was inevitable if the parties would have maintained that there was a dispute in respect of location, boundaries, size and scope of the land in dispute, among others. On scrutiny

of the records, there was no dispute regarding identity of the property and registration. Again, this ground of appeal is devoid of any merit.

The fifth and last ground, is based on the contention that the trial District Land and Housing Tribunal based its decision on matters not raised and submitted by the respondents. Onset, I admit as right position as correctly cited the appellant's counsel in the case of **Charles Christopher Humphrey Kombe v. Kinondoni Municipal Council,** Civil Appeal No. 81 of 2017 (Unreported), that any decision entered basing on the facts or issues not raised by the parties without affording the parties right to be heard, becomes a nullity. When such right to be heard was not properly afforded to the parties, it would be counted that the court has contravened the basic principle of right to be heard under the maxim *audi alteram partem*. Such decision is bound to be quashed. In the case of **Tanganyika Cheap Store Limited and Two Others v. The National Bureau De Change Ltd,** Civil Appeal No. 93 of 2003, CAT at DSM (Unreported), the Court observed that: -

> *"In view of the fact that the framed additional issue raises a serious issue relating to breach of a fundamental principle of natural justice, and for lack of evidence to establish the amount the appellants owe the respondent bank, we quash the judgment and decree."*

I have painstakingly perused the records and testimonies advanced before the trial tribunal with the view of testing if the above principles were, in any way contravened. The observed material relevant in answering this issue are hereunder stated: -

First; The pleading filed by the appellant throughout centred on the question of establishment of the fact that the said properties were matrimonial houses. At paragraph 6 (I) of the appellant's application, she averred that, she was married to the first respondent having contracted an Islamic marriage on the 7th day of August, 2017 to establish that the properties so mortgaged were matrimonial properties. Under paragraph 6 (III), the appellant/applicant pleaded that the cause of action touched the issue of matrimonial properties. It read: -

> *"That the first respondent in obtaining that loan from the 2nd respondent he placed our two matrimonial house (sic) houses one located at Kilosa with residential licence SQT/MG. K/12 Magomeni Kihangahanga and another one hose located at Matongolo Dumila with residential license SQT/DL/68 within Kilosa District as the security in order to secure that loan from 2nd respondent"*

She went on stating at paragraph 6 (IV): -

"That in placing the matrimonial houses as the security in order to obtain loan the 1st respondent acts negligently by failed to obtaining spouse consent from the applicant since those houses are matrimonial properties so the spouse consent is mandatory" (Sic).

In the subsequent paragraphs of the cause of action, the appellant kept alleging that the second respondent acted negligently by not satisfying herself as to whether the properties were matrimonial properties or not. In addition, in the reliefs she sought before the trial tribunal, she prayed among others, the trial tribunal had to declare that the second respondent acted without diligence for not seeking spouse's consent and the agreement was unlawful.

Second; Among the issues raised by the parties, the issue whether the properties mortgaged were matrimonial asset was raised. This is contrary to what the appellant contends. Herein, I quote the relevant part of the handwritten proceedings at page 11, in particular the Coram dated 14/08/2019, which reflects the relevant part: -

"FRAMED ISSUES:

1. *Whether the disputed premises are matrimonial assets.*
2. *Whether the 1st Respondent sought consent from the applicant to secure TSH. 50,000,000/= (Fifty Million) from the 2nd Respondent.*

3. To what relief parties are entitled."

Third; In the hearing, the appellant herself adduced the evidence endeavouring to establish that she was married to the first respondent and that the said properties were acquired by joint efforts. On the other hand, the second respondent sought to adduce evidence that the said properties were not a matrimonial property.

The impugned judgment at pages 11 and 12, the said issue was determined to the effect that the said houses were not proved to be matrimonial assets.

With the above observations, it is my considered view that, the trial tribunal was correct to have discussed the issue and did not contravene any principle in substance. Conversely, it would be a serious mistakes / failure if it would have not discussed and analysed the issues as to whether the mortgaged properties were matrimonial assets or not. Since, the question was central before the trial tribunal, the same gave the appellant locus standi and cause of action to institute this case. Again, it is my finding that this ground is bankrupt and misconceived.

In the final analysis, and to the extent of my observations, all grounds of appeal fronted by the appellant in a bid to challenge the impugned decision of the District Land and Housing Tribunal for Kilosa, at Kilosa are non-meritorious. That being the case, I hereby dismiss the appeal it its entirety.

Considering the nature of the matter itself and the parties to the case, and taking into account that there was an order for attachment and sale of the properties stranded due to the appellant's conduct in an attempt to challenge the process of attachment and sale, and considering the fact that it has been found by the court that there is no justifiable reason(s), I order and direct that the appellant shall pay the costs to the second and third respondents. **It is so ordered.**

DATED at **MOROGORO** this 31st day of August, 2022.

M. J. CHABA

JUDGE

31/08/2022