IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND CASE APPEAL NO. 40 OF 2020

(Arising from Application No. 6 of 2019 of the District Land and Housing Tribunal for Kagera at Bukoba before R. Mtei -Chairman)

NATIONAL MICROFINANCE BANK BUKOBA PLC.....APPELLANT

VERSUS

JULIETH ZACHARIA .....1ST RESPONDENT

VEDASTO KAJUNA .....2ND RESPONDENT

JUDGMENT

14/02/2022 & 12/05/2022

E. L. NGIGWANA, J.

This is an appeal from the decision of the District Land and Housing Tribunal (DLHT) for Kagera at Bukoba in Land Application No. 6 of 2019 delivered on 26th day of March, 2020.

Briefly, the facts giving rise to this appeal as per tribunal record may conveniently be stated as follows; the 1st and 2nd respondents are couples who by joint effort, in 1995, bought a piece of land located at Kibarama area within Bukoba Rural in Kagera Region and built a matrimonial house therein in 1996. It was alleged that, sometimes in 2018, the 2nd respondent without the knowledge and consent of the 1st respondent, mortgaged the said matrimonial house and obtained a loan facility of **Tshs. 20,000,000/=** from the National Microfinance Bank PLC (Appellant), Bukoba Branch.

It was further alleged that, the appellant, without making any effort to satisfy itself as to the marital status of the 2nd respondent and the issue of ownership of the matrimonial house, proceeded accepting the security and advanced the said loan to the 2nd respondent, which was eventually partly repaid by the 2nd respondent. In other words, the 2nd respondent defaulted to repay the loan at a tune of Tshs. **9,407,632.10/=,** and as a result, he took the action of locking the house in dispute and disappeared to unknown place. That following such default, the appellant wanted to auction the security of the loan to recover the outstanding balance.

It is at that stage, the 1st respondent became aware and sued the Appellant and 2nd respondent in the District Land and Housing Tribunal for Kagera at Bukoba claiming for the following reliefs:-

(a) *A declaration that the 1st respondent had interest in the disputed land.*

(b) *A declaration that the mortgaging of the house was unlawful.*

(c) *Permanent injunction restraining the appellant or its agents from auctioning the disputed house.*

(d) *Costs of the suit to be borne by the appellant and the 2nd respondent.*

At the conclusion of the hearing, the matter was decided in favor of the 1st respondent, meaning; the disputed house was declared a matrimonial property (the property of the 1st and 2nd respondents). The appellant was

permanently restrained from entering the suit house, attach it, auction or sell it. The 1st respondent was also awarded costs of the suit.

Being aggrieved by the decision of the DLHT, the appellant while armed with three grounds of appeal has knocked the doors of this Honorable court seeking for justice .The grounds of appeal were coached as follows:-

(1) *That the trial Tribunal failed to properly assess and analyse the evidence of DW1, a loan officer of the Appellant who tendered exhibit "D3", the exhibit which was disregarded and concluded that the suit land was not legally mortgaged by the 2nd respondent to the Appellant.*

(2) *That the tribunal having reached to the conclusion that the suit land is the property of both 1st and 2nd respondents, wrongly restrained the appellant from attaching the suit land, auction or sell it while there is a share of the 2nd Respondent who defaulted to pay the loan to the Appellant.*

(3) *That the trial tribunal failed to note that the 1st Respondent had no any prove of marriage but wrongly concluded that the suit land is a matrimonial property between the 1st and 2nd Respondent.*

Wherefore, the appellant prays that this appeal be allowed with costs by quashing and setting aside the proceedings, judgment and decree of the trial tribunal. That the Honorable court be pleased to order the auction of the suit property for the recovery of the loan secured by the 2nd respondent from the appellant.

When the appeal came for hearing, the appellant had the legal services of Mr. Abel Rugambwa, learned advocate. The 1st respondent appeared in person and unrepresented. The 2nd respondent was served through an alternative service after being traced with no success. He was served by publication vide the Local News Paper to wit; Nipashe dated 10th day of May 2021, but the 2nd respondent neither filed the reply to the petition of appeal nor appeared in court. In the premise, the hearing of appeal proceeded in absence of the 2nd respondent.

Arguing on the first and 3rd grounds of appeal, Mr. Rugambwa faulted the trial tribunal for disregarding an affidavit to wit; exhibit "D3" which according to him, proved and confirmed the subsisting marriage between the 2nd respondent Vedasto Kajuna and a woman known as Arafa Abeid. Advocate Rugambwa went on submitting that the appellant through its Loan Officer (DW1) was satisfied that there was a subsisting marriage between the 2nd respondent and Arafa Abeid that is why it advanced a loan facility to the 2nd respondent.

The learned counsel further argued that the 1st respondent was not a party to the loan agreement and had never raised any objection that she had an interest over the disputed house. The learned advocate referred me to the case of **Hadija Issa Arerary versus Tanzania Postal Bank**, Civil Appeal No. 135 of 2017 CAT (unreported) to support his argument than an affidavit like the one presented by the 2nd respondent to the appellant and admitted in court as **Exh.D3** was sufficient to prove the existence of marriage. The learned counsel ended his submission in chief that the 1st respondent had no legal right over the mortgaged property.

In reply, the 1st respondent submitted that, she was married to Vedasto Kajuna (2nd respondent) in 1990 and were blessed with two issues; Aron Vedasto Kajuna who was born in 1992 and Gideon Vedasto Kajuna who was born in 1994. She added that their marriage was a customary marriage. She further argued that there was no any other marriage contracted by the 2nd respondent with any other woman. She attacked the affidavit "exhibit D3" that it was not sufficient to prove the marriage between the 2nd defendant and the alleged Arafa Abeid.

In his rejoinder in respect of the first and 3rd grounds of appeal, Mr. Rugambwa reiterated that an affidavit is sufficient to prove existence or the non-existence of the marriage. This marked the end of submissions in respect of the first and 3rd grounds of appeal, therefore, what follows in the reaction of this court on the two grounds.

In our jurisdiction, the law is very clear that a marriage can be contracted in civil form, Christian form or customary form. See section 25 of the Law of Marriage Act, Cap. 29 R: E 2019.

In the matter at hand, the 1st respondent alleged that the marriage between her and the 2nd respondent was contracted according to Haya customary rites in 1990. However, under normal circumstances, parties have to register their marriage to prove that a marriage took place. Section 43 (5) of the Law of Marriage Act, Cap. 29 R: E 2019 provides that;

"*When a marriage is contracted according to customary law rites and there is no registration officer present, it shall be the duty of the parties to apply*

for registration, within thirty days after the marriage with the District Registrar or a Kadhi."

In the matter at hand, there was evidence on the trial tribunal record that the marriage between the 1st and 2nd respondents was registered as per dictates of the herein above provision.

However, failure to register a customary law marriage does not invalidate the marriage especially where there is plausible evidence to show that the parties were duly married. See **Ahemed Ismal versus Juma Rajab** [1985] TLR 204 and section 41 (f) of Law of Marriage Act, Cap. 29 R: E 2019.

In the matter at hand, the evidence of 1st respondent which is available on the record was corroborated by the evidence of PW2 Sumaid Byai, 65 years Haya and PW3 Nurathi Mwanadi 66 years, Haya who both testified that the 1st and 2nd respondents were married under customary law and that they saw them living under the same house as husband and wife. PW3 added that the parties were blessed with two issues namely: - Gidion Vedasto and Aron Vedasto.

According to **Exhibit D2**, titled **"Statutory of occupation and ownership of the plot No.369 Block "A" situated at Kemondo"** the 2nd respondent bought the said land on **29/11/1995 from Mr. Khasimu Abadala (Now deceased) at a sum of Tshs. 300,000/=,** the fact which was confirmed by the deceased's wife (PW3). PW3 in her evidence as per trial tribunal record added that, prior to the purchase, the 1st and 2nd respondents arrived at their home two times for negotiations, and at the 3rd

time, the 2nd respondent went to their home while accompanied with two other persons and concluded the side agreement. PW1 told the trial tribunal that she was left in the shop attending customers that is why she did not join the 2nd respondent on the date when the sale agreement was concluded. PW3 went on saying that after purchasing the land, the 1st and 2nd respondents started developing the land whereas they built a house of two rooms and a living/sitting room.

When cross examined, PW3 said, she started living at Kemondo in 1967, thus the 1st and 2nd respondents were not strangers to her. I agree with Mr. Rugambwa that an affidavit titled **"Hati ya kiapo cha ndoa ya kimila"** was admitted in the trial tribunal and marked **Exhibit D3.** It is apparent, the same shows that the 2nd respondent and one Arafa Abeid contracted customary marriage under Haya rites on 20/03/2005 but there is no evidence on record that the marriage was registered under the dictates of section 43 (5) of the LMA, and that, the same does not show whether, prior to the alleged marriage, there was no any other subsisting marriage. Also, the same does not show what property (if any) was acquired through joint effort by the 2nd respondent and Arafa Abeid from 2005 onwards.

It should also be noted that section 60 of the Law of Marriage Act provides;

"Where during the subsistence of the marriage, any property is acquired-

(a) *In the name of the husband or the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse"*

From the foregoing provision, it is clear that not all assets owned or registered under the name of one spouse are deemed properties of that one spouse, meaning there are circumstances where the property may be under the name of one spouse but interest of the other spouse does exist. In the case at hand, the evidence is available on the tribunal record as shown herein above that the disputed property was acquired by joint effort between the 1st and the 2nd respondents, thus the fact that the 2nd respondent has declared in Exh.D2 that he is the absolute owner of the disputed land unencumbered cannot stand.

I know that, it is possible under customary law to have more than one wife, therefore, the central issue in this matter is not to challenge the marriage between the 2nd respondent and one Arafa Abeid but to see whether Arafa Abeid had no automatic legal right in the house in dispute while the same was acquired by 1st and 2nd respondents by joint effort prior to the year 2005, the year of the alleged marriage between the 2nd respondent and Arafa Abeid. In the case **of Hellenah Kasunya, versus Denniss Mathew Mabubu and 2 others,** Land Appeal No.432 of 2017 (Unreported) my brother Hon. Ndunguru, J had this to say;

"My intention is not to challenge the marriage between the 2nd defendant and on Grace Lameck Lusesa, this is because this is a Land case and not a Matrimonial case. But if the 1st defendant had another marriage apart from that which was contracted between PW1, the second marriage could not alienate PW1'S right and interest over the landed properties which they jointly acquired. Thus the need for the consent from PW1 was still prevailing. In the absence of such consent, the mortgage is a nullity"

It is common understanding that any disposition of matrimonial house, which is acquired jointly by a couple, cannot be disposed of in the absence of spouse consent. Equally, in order for a lender to legally create a mortgage under matrimonial property, it must as a matter of law, obtain consent to mortgage the matrimonial home/ property from the mortgagor's spouse.

Section 114 (1) of the Land Act [Cap 113 R: E 2019] states that;

"A mortgage of a matrimonial home including a customary mortgage of a matrimonial home shall be valid ***only if;***

(a) Any document or form used in applying for such a mortgage homes is signed by, or there is evidence from the document that ***it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in that matrimonial home"*** *(emphasis supplied)*

Spouse consent is therefore a prerequisite in any lease, sale or mortgage of matrimonial home. Where spouse consent is not obtained in any of the above transactions, such transaction is ineffectual.

Section 59(1) of the Law of Marriage Act Cap 29 R: E 2019 provides:

"59. - (1) *Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not,* ***while the marriage subsists and without the consent of the other spouse,*** *alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by*

caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds."

Furthermore, Regulation 5 of the Land (Mortgage Financing) Regulations 2009, G.N. No. 355 of 2009 also provides for requirement of spouse consent in mortgaging matrimonial home.

The Apex Court of the Land in the case of **National Bank of Commerce Limited versus Nurbano Abdallah Mulla**, Civil Appeal No. 283 of 2017 (unreported) had this to say;

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

The reason behind this requirement is to protect the sanctity of the matrimonial institution, and further protect the matrimonial residence against risks of losing it in the event of a default. Under the circumstances of this case, the consent of Julieth Zacharia who is the wife of the 2nd respondent was mandatory, unfortunately, there was no such consent.

The appellant relied on **Exhibit D3** to the effect that the wife of the mortgagor was Arafa Abeid. Moreover, it is the submission of Mr. Rugambwa that, an affidavit is sufficient to prove existence or non-existence of the marriage. I agree with him because that is position set in place by the Apex Court of this Country in the case of **Hadija Issa**

Arerary versus Tanzania Postal Bank, (Supra) where the court held interalia that;

"Since the Mortgagor had stated by way of affidavit that he was not married, ***and the bank had taken reasonable steps to verify this,*** *the Appellant who claimed to be the wife of the Mortgagor cannot now benefit the Law of Marriage Act, where a spousal consent is required before registration of mortgage"* **(Emphasis supplied)**

I am alive that, the amendment of section 114 of the Land Act, Cap 113 R:E 2002, now R:E 2019, was effected though section 8 (2) and (3) of the Mortgage Financing (Special Provisions) Act, 2008. Section 8 (2) of the Mortgage Financing Act, imposes the responsibility to the Mortgagor to disclose that he has a spouse or not and **upon such disclosure,** the responsibility shifts to **the mortgagee to take reasonable steps to verify whether the applicant for a mortgage has or does not have a spouse.**

Section 8 (3) of the Mortgage Financing (Special Provisions) Act 2008, 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 was spouse or any other third party holding interest in the mortgaged land"*

The term used in the herein above provision is **"shall be deemed".** According to the Concise Oxford Dictionary, "deemed" means regarded, considered in a special way. In the case of **S V. Rosenthal 1980** (1) SA 65 (A) regarding the term **"shall be deemed"** Trollip JA had this to say;

*"The words **"shall be deemed"** are familiar and useful expression often used in legislation in order to predicate that a certain subject matter, eg. A person, thing, situation, or matter shall be regarded or accepted for the purposes of the statute in question as being a particular, specified kind whether or not the subject matter is ordinarily of that kind. The expression has no technical connotation. Its precise meaning, and especially its effect must be ascertained from its context and the ordinary canons of construction.....some of the usual meanings and effect (deemed provisions) can have are the following; that which is deemed shall be regarded or accepted (i) as being exhaustive of the subject matter in question and thus excluding what would or might otherwise have been included therein but for deeming, or (ii) in contradistinction thereto as being a merely supplementary, i.e. extending and not curtailing what the subject matter include, or (iii) as being conclusive or irrebutable or (iv) contrary thereto as being a merely primafacie or rebuttable. I should add that, in absence of any indication in the statute to the contrary, a deeming that is exhaustive is usually conclusive and one which is merely primafacie or rebuttable is likely to be supplementary and not exhaustive"*

However, it must be noted that deeming provisions must always be construed contextually in relation to the legislative purpose. The Mortgage Financing (Special provisions) Act, 2008 was enacted by the parliament to

amend certain written laws with a view to providing further provisions for mortgage financing.

In the matter at hand, there is no doubt that there was an affidavit sworn by the 2nd respondent that his wife is Arafa Abeid. When testifying before the trial tribunal, the Appellant's Loan Officer (DW1) declared that he had never met the 1st respondent before the loan is issued to the 2nd defendant. DW1 stated that, under normal circumstances, before creating a mortgage under matrimonial property, the appellant's officers have to visit the area where the property intended to be mortgaged situate, interrogate neighbors and local government leaders of the area to satisfy themselves on the ownership and marital status of the mortgagor.

According to section 114 (3) of the Land Act, the mortgagee is **"deemed"** to have discharged his responsibility once there is an affidavit or written and witnessed document which declares that there is a spouse or any third party holding interest in the mortgage land.

Reading the herein above provision and the application of the terms **"deemed"** and **"verify"**, it is my considered view that, **the mortgagee is still bound as per section 114 (2) of the Land Act, to conduct due diligence/take reasonable steps to verify whether the applicant for a mortgage has or does not have a spouse, depending on the circumstances of the parties. In other words, reasonable steps to be taken have to be considered in case to case basis.** According to Black's Law Dictionary, Eighth Edition of 2004, the word due or reasonable diligence entails.

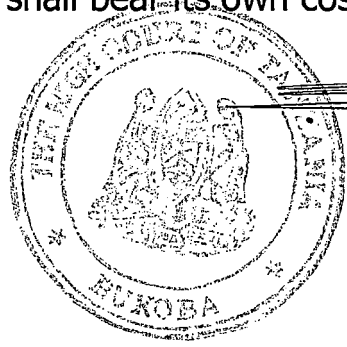
"Diligence *is a continual effort to accomplish something or a care, caution; attention and care required from a person in a given situation. Due or reasonable diligence is the diligence reasonably expected from and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation. A failure to exercise due diligence may sometimes result in liability"*

According to Cambridge Dictionary the term **"verify"** means to make sure or demonstrate that (something) is true, or accurate or justified.

In the matter at hand, the appellant through its officers did not bother to visit nether local leaders nor neighbors of the alleged couples for interrogation and verification on the marital status of the 2nd appellant and ownership of the property in dispute. DW1 told the trial tribunal that they interrogated Arafa Abed, but the record shows the said Arafa Abeid had never appeared before the tribunal to testify on that effect. The facts are very clear that, the appellant has the office here in Bukoba, the 1st respondent was living in a very reachable village in Bukoba Rural. In Rural areas people know each other clearly. Since the property in dispute was in the rural area, it was very easy to confirm who the owner of the same instead on Exh.D3. Having said so, I find the 1st and 3rd ground of appeal devoid of merit; therefore, I hereby dismiss them accordingly.

Arguing the 2nd ground of appeal, Mr. Rugambwa submitted that, the tribunal having reached to the conclusion that the suit land is the property of both 1st and 2nd respondents, ought to have considered, the 2nd respondent had his share in the property, and that the 2nd respondent

defaulted to repay the loan. Mr. Rugambwa added that, in that respect, the trial tribunal wrongly restrained the appellant from attaching the suit land, sell or auction it. I think this ground should not detain me because it is trite that in order for a lender to legally create a mortgage under matrimonial property, it must as a matter of law, obtain consent to mortgage the matrimonial property from the mortgagor's spouse. Since no consent was obtained from the 1st respondent, it cannot be that the mortgage was valid. In other words, the mortgage of the suit property plot No. 369 Block "A" situates at Kemondo, Bukoba Rural in Kagera Region was a nullity for want of the 1st respondent's consent. In the event, I see no reasons to fault the decision of the trial tribunal. The appeal is dismissed in its entirety. Each party shall bear its own costs in this appeal.

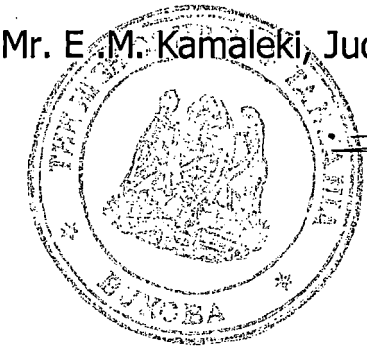


E.L . NGIGWANA

JUDGE

12/05/2022

Judgment delivered this 12th day of May 2022 in the presence of Mr. J. S. Rweyemamu, learned advocate for the appellant, 1st respondent in person, Mr. E. M. Kamaleki, Judges Law Assistant and Ms.Tumaini Hamidu, B/C.



E.L . NGIGWANA

JUDGE

12/05/2022