

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF SHINYANGA)  
AT SHINYANGA**

**LAND APPEAL NO. 32 OF 2022**

*(Appeal from the decision of the District Land and Housing Tribunal of  
Shinyanga)*

**TANZANIA POSTAL BANK.....APPELLANT**

**VERSUS**

**ANNA MATHIAS MAKALANGA.....1<sup>st</sup>RESPONDENT**

**PIUS YEBEKA NTAKUKA.....2<sup>nd</sup> RESPONDENT**

**M/S MCHINGA AUCTION MART REAL  
ESTATE CO. LTD.....3<sup>rd</sup> RESPONDENT**

**BAKARI BUSHIRI NDITI.....4<sup>th</sup> RESPONDENT**

**JUDGMENT**

8<sup>th</sup> June & 18<sup>th</sup> August, 2023.

**MASSAM, J.:**

This is Land Appeal No. 32 of 2022 which originated from the decision of District Land and Housing Tribunal in application No. 43/2017 dated on 22.4.2017. The story behind this appeal in a nut shell is that, the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent are wife and husband. The second respondent had taken loan to the tune of Tsh. 10,000,000/= from the appellant. To secure such loan, the second respondent had

mortgaged the house in question, which is situated at Kitangili area, in Shinyanga Municipality Plot No. 3055 Block GG. The facts show that, the second respondent managed to repay Tsh 6,000,000/= only. He thus failed to repay the remaining loan amount of Tsh 4,000,000/=. Due to that failure, the appellant with the help of the 3<sup>rd</sup> respondent sold the mortgaged property to the 4<sup>th</sup> respondent.

That sale aggrieved the 1<sup>st</sup> respondent hence instituted land application No. 43 of 2017 at the Shinyanga DLHT. Due to failure to adhere to the procedure in public auction, the trial chairman found the entire sale of the mortgaged property nullity, hence ordered the house in question go back to the 1<sup>st</sup> respondent.

That decision aggrieved the appellant, hence this appeal with 5 grounds **one**, the trial chairman did not properly consider the weight of the evidence adduced, **two**, the trial court erred to order the house in question to go to the 1<sup>st</sup> respondent while she is a wife of the 2<sup>nd</sup> respondent, **three**, trial tribunal erred to disregard the documentary evidence proving spouse consent and notification letter to the 2<sup>nd</sup> respondent, **four**, trial chairman erred to decide in favor of the 1<sup>st</sup> respondent while she was not privy to the mortgage agreement, **five**, trial chairman erred to decide in favor of the 1<sup>st</sup> respondent while she

has no locus to challenge the auction as she was never party to the mortgage agreement.

On 8<sup>th</sup> June, 2023, the matter was scheduled for hearing. Mr. Munishi Linus appeared for the appellant whereas Mr. Chrisantus Chengula appeared for the fourth respondent and the 1<sup>st</sup> respondent appeared in person.

Submitting in support of appeal Mr. Munishi prayed to abandon grounds number 2 and 3 and remain with 1, 4 and 5. On ground number 1 he submitted that, when the 2<sup>nd</sup> respondent was taking a loan, the 1<sup>st</sup> respondent acted as a witness and guarantor. She never stated that, she was a wife of the 2<sup>nd</sup> respondent. He added that, the same 1<sup>st</sup> respondent bound herself that when the 2<sup>nd</sup> respondent fails to pay the loan, she would be responsible for that. Cementing on that point, Mr. Munishi stated that, as a guarantor, it is in record that, the 1<sup>st</sup> respondent started paying the same loan. To him, the 1<sup>st</sup> respondent never mortgaged but the 2<sup>nd</sup> respondent. He referred this court to the exhibit D1 and D2. It was Mr. Munishi's assertion that, to the contrary, the 1<sup>st</sup> respondent raised issue of fraudulent and lack of consent when taking a loan, which was not true.

On the remaining grounds Mr. Munishi submitted on them jointly that, the appellant entered a mortgage agreement with the 2<sup>nd</sup>

respondent. The mortgaged property was not said to be a matrimonial property. On that account, he was of view that, it was wrong for the 1<sup>st</sup> respondent to claim against the agreement which she was not a party thereto. He cited the case of **COFACE SOUTH AFRICA INSURANCE LTD vs. KAMAL STEEL LIMITED, COMMERCIAL CASE NO. 108 OF 2020 HC DAR ES SALAAM**

On her reply 1st respondent submitted to it that, she is the wife of the 2<sup>nd</sup> respondent who took a loan of Tsh. 10,000,000/= from the appellant. She said that, the 2<sup>nd</sup> respondent repaid the loan to the tune of Tsh. 5,000,000/=. She added that, she also paid Tsh. 4,000,000/= but she was told that, they remained with the loan of Tsh. 4,000,000/=. She said due to that remaining balance, her house was sold. She went on condemning the auction procedures saying it was not properly followed. She then prayed this court to declare the sell of the house in question a nullity.

Mr. Chrisantus Chengula replied that, he supports the submissions by the appellant. In addition to the submissions by the appellant, he said that, the 1<sup>st</sup> respondent failed to prove that she was the wife of the 2<sup>nd</sup> respondent as per Section 55 of Law of Marriage Act. In his rejoinder, Mr. Munishi insisted this court to take note on the 1<sup>st</sup> respondent's testimonies at the trial court.

I have earnestly gone through both parties' submissions, available records and taken into consideration the rival issues as well. The issue to determine is whether the appeal has merit.

The records show that, there is no dispute that, the 2<sup>nd</sup> respondent took a loan from the appellant. The records provide further that, the 2<sup>nd</sup> respondent failed to repay the said loan to its fullest. In the said loan through exhibits D1 and D2 the 1<sup>st</sup> respondent is seen to be as the guarantor of the 2<sup>nd</sup> respondent. But the said exhibits also show that, the 1<sup>st</sup> respondent was a wife and guarantor of the 2<sup>nd</sup> respondent. These documents actually passed some information to the appellant that, their customer who is the 2<sup>nd</sup> respondent had a wife by the time he was mortgaging his house.

Further to that, exhibit D1 shows that, the 2<sup>nd</sup> and 1<sup>st</sup> respondents were living together in the said house in question at Kitangili. With this information, the appellant ought to have known that, the house in question was a matrimonial home. On account of the aforesaid, the appellant ought to have known that, in order to mortgage a matrimonial house, spouse consent is a must, but the same is not present.

The first respondent, being a wife of the 2<sup>nd</sup> respondent, has interest in the mortgaged house. In terms of Order XXI Rules 57 to 62

of CPC and the case of **Omoke Oloo vs. Werema Magira 1983 TLR 144**, the 1<sup>st</sup> respondent had right to approach the trial tribunal after knowing that, the house with which she has interest was on sale to service the loan. On that account, it is my observation that, the 1<sup>st</sup> respondent was right to approach the trial tribunal as she did.

However, in the trial tribunal's decision, sale of the mortgaged house was declared nullity due to non-adhering to the procedures on the conduction of the public auction, particularly on the issue of advertising it. To the surprise, the appellant in this appeal has never submitted anything to challenge on this aspect. This aspect alone, being unchallenged, leaves the decision of the trial tribunal, particularly on the nullified sale of the mortgaged house unshaken, thus this court will not interfere it.

As alluded earlier that, so long as the appellant ought to have got the spouse consent before she gave loan to the 2<sup>nd</sup> respondent, which she did not do it, then, for failure to adhere to the proper procedure on the conduction of the public auction, I would order them to restart the public auction, but for failure to get the spouse consent, I refrain from ordering so.

Following the prevailing situation that, the bank loan was not all paid and that the 1<sup>st</sup> respondent does not dispute being a guarantor, and there was no dispute that the bank has claiming some amount from the loan which was taken by the 2<sup>nd</sup> respondent. Thus I proceed to order that, the remaining loan amount should be paid by the 2<sup>nd</sup> respondent or his guarantors within a reasonable time which shall be determined mutually between the parties. Failure of which, the appellant will have a right to institute a claim against them.

The bonafide purchaser has also a right to claim his purchase price from appropriate person(s). This order supersedes the costs that was awarded to the 1<sup>st</sup> respondent by the trial tribunal which is hereby quashed. The appeal fails to that extent, no order as to costs.

It is so ordered.

**DATED at SHINYANGA** this 18<sup>th</sup> day of August, 2023.



A handwritten signature in black ink, appearing to read "R. B. Massam".

**R. B. Massam**  
**JUDGE**  
**18/08/2023**