

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

LAND APPEAL NO. 151 OF 2022

(Originating from the decision of the District Land and Housing Tribunal
of Arusha in Land Application No. 54 of 2019)

BETWEEN

KCB TANZANIA LIMITED.....APPELLANT

VERSUS

SARA JOEL MAHANYU..... RESPONDENT

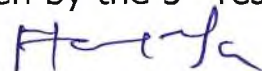
JUDGMENT

11/09/2023 & 14/11/2023

MWASEBA, J.

The dispute between the parties herein is based on a property located at Plot No. 181, Block GG, CT No. 29496, in the Ngulelo area within the Arumeru District of the Arusha region.

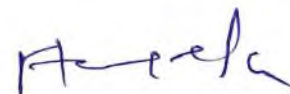
The respondent herein filed a suit against the appellant and two others, claiming that she is the wife of the 3rd respondent (at the trial tribunal) and is also the lawful owner of the mortgaged property (matrimonial property). She further alleged that the mortgaged property was kept as collateral without her knowledge of the loan taken by the 3rd respondent



(her husband), and she did not consent to the matrimonial property being used as collateral. After the trial tribunal heard both parties and reviewed their documentary evidence, it decided that the respondent did not consent to the matrimonial properties being used as collateral. Consequently, it decided to prohibit the 1st and 2nd respondents from auctioning the matrimonial property located at Plot No. 181, Block GG, CT No. 29496, and directed them to find alternative means to secure their loan from the 3rd respondent.

Being aggrieved by the trial tribunal's decision, the appellant lodged the present appeal stating four (4) grounds of appeal; -

- 1. That, the trial tribunal grossly erred in law and fact by holding that there was no spousal consent issued to create the mortgage against the defaulted loan.*
- 2. That, the trial tribunal erred in law and fact by holding that a spouse consent must be in the standard/prescribed form.*
- 3. That, the tribunal grossly erred in law and fact by failing to consider the evidence produced by the appellant showing spousal consent that was given in relation to the mortgage to secure loan.*



4. That, the tribunal erred in law and fact by deciding the case against the weight of evidence.

During the hearing of the appeal, the appellant was represented by Mr. Moses Mmbando, learned advocate, while the respondent was represented by Mr. Fatuma Amir, learned counsel. The hearing was done by way of written submission.

Supporting the first and second grounds of appeal, Mr. Mmbando submitted that the appellant tendered an affidavit of spouse consent and an affidavit of marriage of the mortgagor, which were admitted as exhibit D1 collectively. Based on paragraphs 1 to 8 of the respondent's affidavit, it was proven that she was aware of the loan taken by her husband, and she consented for the matrimonial property to be kept as collateral for the newly added loan of Tshs. 145,000,000/=.

He further submitted that, in paragraph 3, the respondent admitted that she signed the affidavit willingly without any force from the appellant. Thus, as the appellant believed the words of the respondent and her husband, so the respondent is not allowed to go back on her words. His arguments were supported with a number of cases, including the case of

Trade Union Congress of Tanzania (TUCTA) v. Engineering



Systems Consultants Ltd & Others, Civil Application No.51 of 2016,
and **Section 123 of the Evidence Act**, Cap 6 R.E 2019.

He argued further that the trial tribunal's chairman misconstrued **Section 114 (a) and (b) of the Land Act**, by holding that the provision excludes the affidavit of spousal consent as among the documents intended to be used in showing consent of the spouse, since any evidence of the mortgagor's spouse to assent to the mortgage becomes valid. Thus, what is important is the spouse's consent and not its format. More to that, he submitted that the respondent did not explain why she signed an affidavit that she did not understand. Therefore, as exhibit D1 was never objected to, the appellant proved that there was a spouse's consent, and it was wrong for the tribunal to hold that there was no consent from the spouse.

Moving to the third and fourth grounds of appeal, Mr. Mmbando complained that the evidence of the appellant was not well evaluated by the trial tribunal. As the appellant tendered exhibit D1 (Affidavit of spouse's consent), which was never objected to, it was wrong for the tribunal to hold that no consent of the spouse was tendered by the appellant. He said further that exhibit D1 proved that the appellant was aware of the loan, and he consented for her husband to be given a loan

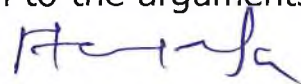


of Tshs. 145,000,000/=. DW1 testified that he was the one who processed the loan and gave the respondent an affidavit of the spouse's consent to sign; so, the respondent was aware of the loan taken by her husband. In the end, he prayed for the appeal to be allowed and the judgment and decree of the trial tribunal to be quashed and set aside.

Opposing the appeal, Ms. Fatuma submitted that the center of the dispute between the parties herein is Exhibit D1 (Affidavit of consent of a spouse, Sarah Joel Joshua) regarding the creation of a mortgage for banking facility to her husband of Tshs. 145,000,000/=. She submitted further that as the respondent denied being aware of exhibit D1, the doctrine of promissory estoppel does not apply. She said further that the appellant failed even to bring Advocate Upendo Joel to prove that the respondent did sign the alleged affidavit.

It was her further submission that exhibit D1 did not disclose which kind of property is consented to be mortgaged. More to that, exhibit D1 proved that it was signed in the absence of Ms. Upendo, a learned counsel, as she witnessed it at an unknown place, date, and month of the year. Thus, she prayed for the appeal to be dismissed with costs.

In brief rejoinder, Mr. Mmbando reiterated what was submitted in his submission in chief. I have given keen deliberation to the arguments for



and against the instant appeal. It appears from the trial tribunal's decision and the records that, in this appeal, the main issue for determination is whether the appeal is merited or not. Further, all the grounds of appeal will be determined jointly as they both centered on the spouse's consent, whether the respondent consented or not.

It is a trite law that when a party want to mortgage a matrimonial home, consent of the other spouse is required. As it is stipulated under

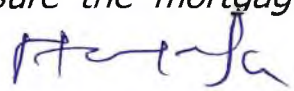
Section 114 (1) and (2) of the Land Act, Cap R.E 2019 that:

"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."

The same was held in the case of **Samwel Olung'a Igogo and two others v. Social Action Trust Fund and Others**, (2005) TLR 343 that:

"The mortgage of a matrimonial home will only be valid if any document or form is used in applying for such mortgage is signed or there is evidence from the document that it has been asserted to, by the spouse of the borrower living in the matrimonial home."

In our present case the respondent disputed to have been aware with the loan taken by her husband and that she was never consented for the matrimonial home to be kept as collateral. At the trial tribunal the third respondent who is the husband of the respondent herein also admitted that his wife was never consented for the matrimonial home to be kept as collateral for the loan he took at KCB Bank.

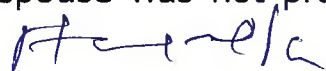
On his side, the appellant relied on the affidavit of marriage deposed by the respondent's husband and affidavit of consent of spouse alleged to have been signed by the respondent herein which was admitted as exhibit D1 collectively. I have revisited the records of the trial tribunal particularly exhibit D1 (affidavit of consent of spouse) and noted that

as a witness at the trial court. More to that, exhibit D1 is silent as to which property was kept as collateral.

It was the duty of the appellant to prove the anomalies raised by calling a proper witness (learned counsel) who prepared the spouse consent to clear the doubts that it was the respondent who signed exhibit D1, and she consented for their matrimonial home to be kept as security. See the case of **Yusneth Masambiro Sadock v. Equity Bank Ltd** (Land Case 95 of 2019) [2021] TZHC LandD 785 (30 September 2021).

In his submission, Mr. Mmbando alleged that as Exhibit D was admitted without any objection the respondent is estopped from challenging it at this stage and the trial chairman was not supposed to question it in his judgment. With due respect, the counsel for the appellant ought to know that admission of a document in evidence does not automatically form the basis of the decision because admissibility is one thing, and its applicability and reliance is another thing. See the case of **Ndalawa Shilanga and another v. The Republic**, Criminal Appeal No. 247 of 2008 (CAT). Therefore, being admitted as exhibit does not mean the court or tribunal will rely on such documents even if it is defective.

Up to this juncture and based on the reasons submitted herein, it is the firm view of this court that a consent of the spouse was not properly



acquired. Which is equally as if there is no consent at all. Thus, as decided by the trial tribunal the appellant has to find other means for the respondent's husband to repay the alleged loan and not to auction the matrimonial property.

In the event, I find no merit in the appeal; it is dismissed in its entirety. The decision of the trial tribunal is left undisturbed. Due to the circumstances of this case, I give no order as to costs.

Ordered accordingly.

DATED at ARUSHA this 14th day of November 2023.




N.R. MWASEBA

JUDGE