

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(MOROGORO SUB - REGISTRY)  
AT MOROGORO**

**LAND APPEAL NO. 131 OF 2023**

*(Originating from the decision of the District Land and Housing Tribunal of Kilombero at Ifakara in Land Application No. 92 of 2017 dated 2<sup>nd</sup> October 2023)*

**GLORIA OMARI MATARI .....APPELLANT**

**VERSUS**

**REGISTERED TRUSTEES OF KILOMBERO WORKERS  
SACCOSS..... 1<sup>ST</sup> RESPONDENT**

**YOSAMA MICROFINANCE  
LTD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

19/03/2024 & 18/04/2024

**KINYAKA, J.:**

At the Urban Primary Court of Ifakara, the appellant was on 22<sup>nd</sup> August 2013 appointed alongside Aloyce Kassena as co-administrators of the estate of the late Teri Sosthenes Kassena. Among the assets left by the deceased is a house built on plot No 290, Block K Jongo Area, within Ifakara Township, herein after "the matrimonial house in dispute."

In the course of exercising the said duty, it came into the knowledge of the administrators that, the title deed of the matrimonial house in dispute was in the custody of the 1<sup>st</sup> respondent who claimed to hold the same under the loan agreement. The appellant contended that the loan

agreement and the undertaking to secure the loan with the matrimonial house, lacked her consent as the then wife to the deceased.

On 8<sup>th</sup> March 2017, acting under the instruction of the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent issued a notice demanding the appellant to pay a total amount of TZS 22,847,459 within 14 days, and in default, the matrimonial house would be disposed of. Dissatisfied, the appellant lodged an application at the District Land and Housing Tribunal of Kilombero at Ifakara, hereinafter, "the Tribunal" beseeching for the following reliefs:-

1. Declaratory judgment that the alleged mortgage is illegal for want of spousal consent and or contravening the 1<sup>st</sup> respondent's own constitution;
2. Declaratory judgement that the respondents' intended disposition of the motgage property is illegal;
3. Perpetual injunction against the respondents regarding the sale of the mortgaged property,
4. An order for surrender of the title to the mortgage property into the hands of the applicants;
5. The respondents be condemned to pay costs; and
6. Any other reliefs the honourable tribunal might deem just and proper.

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After hearing both parties to the application, the trial tribunal found the respondents' evidence to be weighty than that of the appellant and therefore ordered the 2<sup>nd</sup> respondent to proceed with the intended sale of the matrimonial house. Undaunted with the said decision, the appellant brought the present appeal armed with four grounds of complaints namely:-

1. That, the Tribunal erred in law and in fact in not properly evaluate and consider the evidence adduced by the Appellant/Applicant on spousal consent, that was fraudulently obtained document and her credible witnesses during the hearing of the Application;

2. That, the Honorable Trial Tribunal erred in not putting into consideration time limit from 25/02/2010 to 16/10/2017, the time that the Appellant filed this Application;

3. That, the Honorable Chairperson erred in law in not considering the fact that the Appellant/Applicant was only the Administrator of the Estate of the late husband TERI SOSTENES KASENNA; and

4. That, the trial Tribunal grossly erred in law and in fact in holding that the loan contract and the mortgage was still valid while the Respondents did not make their defense to prove that such contract was still valid to the said mortgage property and against the Appellant/Applicants' interest.

At the hearing of the appeal, the appellant enjoyed legal representation of Mr. Barthalomew Tarimo, learned advocate, whereas Mr. Sukujua Funuki represented the 1<sup>st</sup> respondent. As for the 2<sup>nd</sup> respondent the matter proceeded *ex parte* against him following his nonappearance despite being served by substituted service through publications effected in Mwananchi Newspaper on 14<sup>th</sup> February 2024, 6<sup>th</sup> March 2024 and 8<sup>th</sup> March 2024. It was agreed that the matter be canvassed through written submissions. Both parties dutifully submitted their respective submissions on time.

In his written submissions for the appellant, Mr. Tarimo started by dropping the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal and retained the 1<sup>st</sup> and 4<sup>th</sup> grounds.

Expounding on the 1<sup>st</sup> ground of Appeal, Mr. Tarimo complained that the evidence adduced by the appellant during the trial on spousal consent was not properly evaluated and considered and that such a document was fraudulently obtained. He elaborated that through paragraph 8 (A) (iii), (iv), (v) & (vi) of the application, the appellant's testimony and exhibits tendered during the hearing of the application, the appellant totally denied to have known any arrangements purported to the mortgaging of her matrimonial house claimed by the 1<sup>st</sup> respondent.

Putting reliance on the provision of section 17(1) of the Law of Contract Act, Cap 345 R.E. 2019, hereinafter, "the LCA", and the decisions in the cases of **ALFL East Africa Ltd v. THEMI INDUSTRIES & distributors AGENCY LTD [1984] TLR. 256**, **Othman Kawila Matata v. Grace Titus Matata [1981] TLR 23**, and **R.G. Patel v. Larji Makanji [1957] E.A 314**, Mr. Tarimo attacked the trial chairperson for erroneously relying on Exhibit KD1 while the same lacked qualities of a spousal consent and rather a merely "FOMU YA MAOMBI YA MKOPO WA BIASHARA".

He further faulted the spousal consent part in the said loan form for not being witnessed or authorized by any authorized officer. He cited the case of **Fanuel Zakayo v. Aneth Raphael & CRDB Bank Ltd, Civil Appeal No. 9 of 2020**, section 70 of the Evidence Act Cap 6 R.E. 2022, hereinafter, "the Evidence Act" and section 91 of the Land Registration Act Cap. 6 R.E. 2022, hereinafter, "the LRA" to add weight to his contention and averred that in the instant matter, there was neither separate spousal's consent nor mortgage deed tendered.

In regard to the 4<sup>th</sup> ground of appeal it was Mr. Tarimo's contention was that the mortgage deed was not in a prescribed form as required by law. In his view, there were no mortgage at all. He referred the Court to

sections 2 and 113 (4) of the Land Act, Cap 113 R.E 2019, hereinafter, "the Land Act", sections 8 of the Registration of Document Act Cap 117 R.E. 2019, hereinafter, "the RDA", section 91 of LRA and section 89 of the Evidence Act to substantiate his assertions.

He maintained that as regards to the claim that the alleged spousal consent was fraudulently obtained, the burden of proving that it was the appellant who signed the spousal consent and not any other person lied on the 1<sup>st</sup> respondent. In light of the above submissions the appellant's counsel prayed for the decision of the Tribunal to be quashed and set aside; for a declaration that the spousal consent was illegal and defective; for the alleged mortgage to be found unregistered and therefore unenforceable; for an order restraining the 1<sup>st</sup> respondent from interfering with the appellant's ownership in the suit premises; and an order for costs.

In reply, the 1<sup>st</sup> respondent's counsel cited section 45 of the Land Disputes Courts Act Cap 216 R.E 2019, hereinafter, "the LDCA" and substantiated that the trial tribunal properly evaluated the evidence adduced by litigants before it and came out with a just decision contrary to what is alleged by the appellant. He refuted the claim that the spousal consent was fraudulently obtained and submitted that the documentary evidence on



record display openly, that the appellant consented by signing the spousal consent that was tendered and admitted without any objection.

Commenting on the appellant's inaction against the alleged forgery on part of the 1<sup>st</sup> respondent, Mr. Funuki contended that the same is a proof that the appellant did consent to the spousal consent and that the same was obtained according to the law. He added that mere assertion that there was fraud in obtaining the appellant's consent is not conclusive without strict proof thereof as it was held in the case of **R.G Patel v. Laiji Mkanji [1957] EA 314 on page 316** where it was underscored that allegation of fraud must be proved strictly.

It was his substantiation that the balance of probability as enacted in section 3(2)(b) of the Evidence Act was met by the respondent. He distinguished the case of **Fanuel Zakayo** (supra) cited by the appellant as in the present case the mortgage was registered as per the requirement of the law.

Submitting against the 4<sup>th</sup> ground of appeal, Mr. Funuki was of the strong view that the trial tribunal was right to hold as it did. According to him, since the contract was still valid, the Respondent had a right to execute the same by selling the mortgaged property in order to get back her money.

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On the claim that there was no mortgage deed in the prescribed form, Mr. Funuki countered the argument for being vexatious allegation which cannot hold water. He argued that the appellant did not state any provision to support the assertion that the mortgage can be vitiated merely because it was made out of prescribed form. He wound up by beckoning the Court to dismiss the present appeal with costs in favour of the 1<sup>st</sup> respondent.

Rejoining, Mr. Tarimo insisted that the burden of proof of the genuineness, legality and validity of the Exhibit KDI, was upon the respondents and that the act of the trial Chairperson to admit it and relied on it to make a decision in the existence of an objection on want of spousal consent, occasioned miscarriage of justice.

As for the 1<sup>st</sup> respondent's contention that fraud can be established and proved only when a court of law constitutes itself as a criminal court, Mr. Tarimo submitted that the case of **R.G. Patel** (supra) is of less relevancy in supporting Mr. Funuki's position. On the contrary he said, fraud can also be proven in civil case as it was held in the case of **Othman Kawila Matata** and **R.G. Patel** (supra) where the Court stated that;

*"Allegation of fraud must be strictly proved; although the standard of proof may not be too heavy as to require prove beyond*

*reasonable doubt, something more than a mere balance of probability is required"*

He insisted that had the trial Chairperson properly evaluated and considered the pleadings, testimony and exhibits tendered by the parties before it, he would have decided the matter in favour of the appellant.

He submitted that the case of **Fanuel Zakayo** (supra) applies to the matter at hand whereas that of **The Registered Trustees of St. Anita's 21 Greenland Schools (T) & Six Others v. Azania bank Limited, Civil Appeal No. 225 of 2019** cited by Mr. Funuki is in no way related to the matters before this Court.

As for the 4<sup>th</sup> ground of Appeal Mr. Tarimo insisted that the alleged mortgage is not only devoid of merits for want of spousal consent but also for want of registration as required by law. In finality the learned counsel reiterated the prayers in his submission in chief.

I have considered the rival contentions from both parties. It is now my duty to determine the appeal. In so doing and for the purpose of convenience, I shall begin with the fourth ground of appeal, followed by the first.

On the fourth ground of appeal, the appellant's complaint as gleaned from his submissions is that there was no valid mortgage deed in a prescribed form, and if there was any, the same was not registered. He was of the

view that Exhibit KD1, "FOMU YA MKOPO WA BIASHARA" was not a mortgage deed. I agree with the appellant that Exhibit KD1 was not a mortgage deed. However, in my scanning of the trial tribunal's records in a bid to resolve the said complaint I have found nowhere in the records indicating that the issue as to the creation, existence, registration or validity of the mortgage deed was raised and canvassed before the Tribunal.

With that said, this Court desists from determining the newly raised issue at this level of appeal. It is settled position through case laws that an appellate court will only look into matters which came up in the lower court and decided but not matters which were neither raised nor decided by the same. [See the case of **Hassan Bundala Swaga v. The Republic, Criminal Appeal No. 386 of 2015** (unreported) on page 4].

In the case of **Halfani Charles v. Halima Mapapu, Misc. Land Appeal No. 85 of 2021** (unreported), the High Court on page 7 of the decision held that:-

*"I respectively agree with the learned counsel for the respondents that generally it is not proper to raise a ground of appeal in a higher court based on facts that were not canvassed in the lower courts. Ordinarily, in order for the Court to be clothed with its appellate powers, the matter in dispute should first go through lower courts or tribunals."*

Based on the observation above, I refrain from determining the 4<sup>th</sup> ground of appeal which raised new matters which were not raised by the parties, deliberated and decided upon by the Tribunal. The fourth ground of appeal is dismissed.

Turning to the 1<sup>st</sup> ground of appeal, Mr. Tarimo attacked the Tribunal for its failure to properly evaluate and consider the spousal consent pointing out that the same was fraudulently obtained and that it was not attested. He highlighted that there was no separate spousal consent tendered before the Tribunal.

In order to address the ground, I find it imperative to revisit the governing law on requirement of a spousal consent in mortgaging a matrimonial home. Of relevancy is section 114 of the Land Act read together with 59(1) of the Law of Marriage Act Cap. 29 R.E. 2019, hereinafter, "the LMA" which provide that:-

*"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) N/A"

Equally, section 59(1) of the LMA provides that:-

"59(1) Where any estate or interest in the matrimonial home is owned by the husband or by the wife, he or she shall not, while the marriage subsists and without the consent of the other spousal, 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 the caveat, caution or otherwise under any law for the time being in force relating to the registration of title of the land or of deeds."*

As per the above provisions, the consent of a spouse in creation of a mortgage of a matrimonial home is a mandatory requirement in the sense that the mortgage becomes valid only when it is consented by the mortgagor and his/her the spouse.

In the matter under scrutiny, being aware of the requirement set by the provisions, the appellant is challenging the alleged creation of a mortgage of her matrimonial home for want of her consent as a wife to the mortgagor, complaining that the same was fraudulently obtained. In her testimony, the appellant told the trial tribunal that she was neither aware of the mortgage nor the loan that her late husband took from the 1<sup>st</sup> respondent.

I have made a perusal of the Tribunal's records. It is undisputed that the appellant started living with the late Teri Kassenà sometimes in November 1994 and later on officialised their union under the Christian rites on 27<sup>th</sup> November 2004. It is also on record and uncontested that the two built the matrimonial house in dispute in which the appellant is staying therein

to date. As rightly deliberated by the Tribunal, the house in dispute is undeniably a matrimonial home of the appellant and her late husband. It means that the Appellant's spousal consent was mandatorily required in the creation of mortgage over the matrimonial house as per the provision of section 114 of the Land Act and 59(1) of the LMA.

It important to note that from the evidence on record, it was clearly established that the appellant signed and consented to the loan agreement admitted in evidence as KD1. Exhibit KD1 contained in it an undertaking to offer the matrimonial home as one of the secured assets for the loan. However, in her testimony in chief, the appellant vehemently disputed that she never consented to the same claiming that her allegedly consent was fraudulently obtained.

I have read the loan agreement entered between the late Teri Kassena and the 1<sup>st</sup> respondent on 24/02/2010 within which the alleged appellant's consent was made. For easy of reference, I find it apt to reproduce an extract of Exhibit KD1 on page 5 relating to spousal consent complained of:

**"RIDHIO LA WANANDOA**

**MUME/MKE (Kwa wale waliooa au kuolewa)**

Mimi...GLORIA OMARY MATALI.....mke/mume

wa....TERI SOSTENES KASSENA.....Naridhia



*ya kuwa mali iliyotajwa katika ibara ya 8 hapo juu iwe dhamana ya mkopo huu.*

*Jina....GLORIA OMARY MATALI.....Saini..Gloria.....*

*Imetiwa Saini kwa niaba ya kamati ya chama (Kamati ya mkopo)]*

*.....N/A.....*

**IMESAINIWA NA KUTOLEWA**

*NA....TERI KASSENA.....**ambaye ni***

**MKOPAJI** mbele yangu leo

*TAREHE..25/02/2010.....*

*SAINI .....*

*ANWANI...S.L.P 280 Ifakara.....*

*CHEO ....Wakili....."*

The original loan agreement on that specific extract show that the appellant duly signed the same and Mr. Augustine M. Kusalika signed as Notary Public and Commissioner for Oaths. I take the view that on the balance of probability, the respondents had before the Tribunal proved that the appellant assented to the alleged mortgage. In my understanding of the law governing civil suits, the appellant who alleged that the consent was obtained fraudulently, was supposed to prove on such facet before the Tribunal as required by Section 110 (1) and 111 of the Evidence Act. Upon the respondent's proof that the appellant's consent was properly obtained and that it is the appellant who signed the same, the burden shifted from the 1<sup>st</sup> respondent to the appellant to prove that the consent

was obtained fraudulently. This position was maintained by the Court of Appeal in the case of **Crescent Impex (T) Limited v. Mtibwa Sugar Estates Limited, Civil Appeal No. 455 of 2020** (unreported) where it was enunciated that:-

*"It is also elementary that the standard of proof, in civil cases, is on a balance of probabilities which means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. Likewise, it is the law that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/her burden to prove...."*

Likewise in **Paulina Samson Ndawanye v. Mtibwa Sugar Estates Limited, Civil Appeal No. 455 of 2020** (unreported), when called upon to deliberate on a situation like the one at hand, where the respondent distanced herself from the transaction involving sale of the land to the appellant claiming that the same was fraudulent, the Court of Appeal had the following to underscore on page 19 of its judgment:-

*"It is common ground that the respondent distanced herself from Exhibit PI both in her WSD and in her evidence as well. She alleged in her WSD that Exhibit PI was fraudulently made to defraud her of the plot of land. However the WSD did not give any particulars of the fraud contrary to the provisions of Order VI rule 4 of the Civil Procedure Code, Cap 33 [R.E 2002]."*

*She did not lead evidence to prove fraud. It may not be completely irrelevant to observe that since fraud imputes criminal offence proof of it ought to have been above mere preponderance of probabilities. See: Omary Yusufu vs. Rahma Ahmed Abdulkadr [1987] TLR 169 and Ratilal Gordhanbhai Patel vs. Layi Makany [1957] EA 314. Be it as it may, the burden of proof that the appellant and the respondent had executed the contract fell on the appellant."*

In this case, since through the testimonies of DW1 and DW2 which was supported by Exhibit DK1, the 1<sup>st</sup> respondent established that the appellant herein was aware of the loan agreement between the 1<sup>st</sup> respondent and her late husband and that she consented to the mortgage of their matrimonial home by signing the same, then the burden of proving that she didn't consent to the same shifted from the 1<sup>st</sup> respondent to her. In essence, the appellant's mere disassociation of herself from the purported consent was not enough. The appellant ought to have provided cogent evidence to substantiate her claim that her consent or signature was fraudulently obtained. As she failed to discharge that burden, it is the finding of this Court as it was the Tribunal's that the allegations that the consent was fraudulently obtained is unfounded. Again, I am mindful of the fact that the law under section 75(1) of the Evidence Act is to the effect that the comparison of the impugned

signatures can be made so as to ascertain, whether or not the signature belongs to the person by whom it is alleged to have been made. Section 75(1) provides:-

"75(1) *In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.*"

In applying the above authority to the present case, I have compared the signatures appended to the purported spousal consent to that in the marriage certificate. It is crystal clear that the two are very much alike. In light of the observation, I entertain no doubt that in both documents, it was the appellant who appended the said signatures.

In holding as above, I am guided by the recent decision of the Court of Appeal in the case of **Ahmed Freight Limited Another v. ECOBANK Tanzania Limited, Civil Appeal No. 182 of 2020** (unreported). In that case, the Court of Appeal sitting as the first appellate court was called to resolve as to whether the comparison of the second respondent's

signatures made by the High Court was proper. The Apex Court had the following to say on page 13 through to 14:-

*"We hasten to state that, the dispute concerning the signatures contained in exhibits P1, P2, P9 and D1 was properly resolved by the trial judge by comparing the same and forming an opinion that they were those of the second appellant. Generally, handwriting or signature may be proved on admission by the writer or by evidence of a witness or witnesses in whose presence the document was written or signed. Moreover, the disputed hand writing or signature may be proved by opinion of the handwriting expert, evidence of persons who are familiar with the writing of a person who is said to have written a particular writing as provided under sections 47 and 49 of the Evidence Act, Cap. 6 R. E. 2022 and **through comparison by the Court with a writing made in the presence of the court or admitted or proved to be the writing or signature of the person.**" [Emphasis added].*

Guided by the above authority, I find that the purported spousal consent was valid as it was signed by the appellant as proved by the appellant's similar signature in the marriage certificate admitted by the Tribunal as Exhibit P1. The appellant did not dispute that the signature appended to Exhibit P1 was not hers but she alleged that she signed after her husband forced her to sign. I hold that the purported spousal consent was valid as



it was signed by the appellant whose consent was mandatorily required as the then legal wife to the deceased.

With regard to the claim that the spousal consent was not in the prescribed form, the same is misplaced. In my understanding of the law, there is no specific format as to the spousal consent. To the contrary, what is required is a proof that the person to whom the consent is sought, consented and signed to mortgage the matrimonial house, whether in a separate document or within the loan agreement or any other document used to grant the mortgage. My position is based on my interpretation of section 114(1) (a) and (b) of the Land Act which provides that *'any document or form used in applying for or granting the mortgage is signed by, or there is evidence from the document that it has been assented to by the mortgagor and spouse or spouses of the mortgagor living in the matrimonial home'*.

Reading the wording of the spousal consent in Exhibit KD1 and as illustrated above in this judgment, I am satisfied that the spousal consent was properly obtained irrespective of its incorporation in the loan agreement.

Lastly, with regards to the concern that the spousal consent was not attested, I have noted the same to be a new issue that was never raised at the Tribunal. This Court would lack mandate to entertain the same.

However, being a point of law which can be raised even at this level, Exhibit KD1 speaks louder than the consent, being part of the loan agreement, was attested by Mr. Augustine Kusalika, Notary Public and Commissioner for Oaths on 25/02/2010. I do not find merit in the first ground of appeal and I accordingly dismiss the same.

From the foregoing analysis and findings, the appellant's appeal fails to the extent demonstrated above. I uphold the decision of the Tribunal in its entirety and consequently dismiss the present appeal. The dispute being preferred by the appellant in attempt to protect the disposition of her matrimonial home, I make no order as to costs.

It is so ordered.

**DATED at MOROGORO** this 18<sup>th</sup> day of April 2024.

*H. A. Kinyaka*

**H. A. KINYAKA**

**JUDGE**

**18/04/2024**



**Court:**

Judgement is delivered in the presence of Advocate B. Tarimo for the Appellant, the Court Clerk, Switibet Hamaro Paulo and in the absence of all respondents.



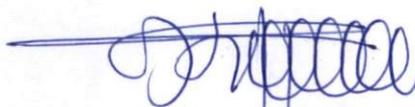
S. P. Kihawa

**Deputy Registrar**

**18/04/2024**

**Court:**

Right of the parties to appeal to the Court of Appeal of Tanzania fully explained.



S. P. Kihawa

**Deputy Registrar**

**18/04/2024**

