

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA SUB-REGISTRY
AT MBEYA

LAND APPEAL NO. 26554 OF 2023

(Originating from the decision of the Mbeya District Land and Housing Tribunal in Land Application No. 11 of 2023)

CHRYSPENE MACHESHA..... APPELLANT

VERSUS

MARY KUSENA KUMOTA.....1ST RESPONDENT

KUMEKUCHA SACCOS LIMITED.....2ND RESPONDENT

ORDER AUCTION MART.....3RD RESPONDENT

JUDGMENT

Date of last Order: 10th May, 2024

Date of the Judgment: 19th June, 2024

KAWISHE, J.:

The appellant, Chryspine Machesha being aggrieved with the decision of the District Land and Housing Tribunal of Mbeya in Application No.11 of 2023, filed an appeal before this court with three grounds of appeal as follows:

- 1. That the trial chairman of the Mbeya District Land and Housing Tribunal erred in law and facts when holding that the residential house be attached and sold to cover the loan while the said residential house was not put as security for the loan.*

2. *That the trial chairman erred in law and in facts when it failed to evaluate properly the evidence on records which avail that the appellant did not have consent on the said loan and security thereof.*
3. *That the trial chairman erred in law and in facts to deliver judgement in favour of the respondents based on fabricated evidence.*

The gist of this appeal is, the applicant before the trial tribunal claimed to be the lawful owner of the house in dispute which is located at Nsalala, in Mbalizi, house No. 171, in Mapinduzi street. His wife Mary Kusena, who is the first respondent in this case, entered into a loan agreement with Kumekucha SACCOS Limited of Tzshs 3,000,000/=. The said loan was repaid by the applicant, and he agreed the house in dispute to be used as security. The first respondent entered into another loan agreement in absence of her husband/the applicant/appellant. The applicant denied to allow the house to be used as security in the second loan agreement and to sign spouse consent. But the applicant agreed to repay the said loan from 10/2022 for seven months. But before he fulfilled his promise to repay the said loan, his house was about to be sold by the 2nd respondent. He was not provided with the notice of the sale of his house. He was supplied with the notice to repay the loan on 5/2/2023.

The 2nd respondent and 3rd respondent under the service of the learned counsel Ms. Jenifa Silomba, testified that, they entered into loan

agreement with the 1st respondent in the year 2021, they advanced a loan to the 1st respondent of Tshs 3,000,000/= with interests of Tshs 585,000 per anum. There was the spouse consent of the applicant. The applicant agreed to repay the loan on 2022, but he did not pay the said loan up to this time. There is loan agreement form, spouse consent and agreement to repay the loan on 21/1/2023 were tendered by the 2nd and 3rd respondent and were admitted as exhibit D1 collectively. The case was heard ex parte against the 1st respondent.

The trial tribunal having heard both sides concluded that the 2nd respondent is entitled to sell the residential house which was mortgaged by the applicant and the 1st respondent. Hence, the applicant was aggrieved by the said decision and filed an appeal in this court.

The parties agreed to dispose of this appeal by way of written submission. The court set the schedule and the parties complied with. The appellant appeared under the service of the learned counsel, Mis. Neema Siwingwa whereas, the second and third respondents enjoyed the services of Ms. Jenifa Silomba, learned counsel.

Ms. Siwingwa, learned counsel for the appellant, in her introductory part, in summary, the counsel argued that, the loan agreement entered between his wife and the second respondent had

been repaid on 8/11/2021 via MPESA transactions to Kumekucha SACCOS. When the appellant prayed to tender his document to prove the payment of the said loan of 20/2/2021 he was denied by the trial tribunal. The respondents came with the documents of the loan which has already been paid. The second loan agreement between the appellant's wife and the respondent were entered when the appellant was outside the country.

Despite having the long introduction, later on the counsel proceed to argue the grounds of appeal as follows:

On the first ground of appeal, she argued that, the attachment of the residential house to repay the said loan is contrary to the provision of the law as per section 48(1) (e) of the Civil Procedure Code Cap.33 R.E 2019. To cement her position, she cited the case of **MS. Sykes Insurance Consultants Company Ltd vs. MS. Sam Construction Company Ltd**, Civil Revision No.8 of 2010 (unreported) but available on Tanzlii).

Submitting on the second ground of appeal about evaluation of evidence, the appellant's counsel argued that, the trial tribunal chairman misdirected himself by failure to admit the additional documents which were tendered by the appellant. The appellant denied not to repay the

said loan, the documents tendered by the respondents were already paid fully since 8/11/2021 via MPESA transactions to the second respondent. The receipts for payment were denied to be admitted in additional documents when it was prayed. Hence, the trial chairman lost a good flow in evaluating the evidence, since the respondents came with the documents of the loan which was already paid.

Reverting on the last ground of appeal, is also about evidence, that the respondents had no documents to prove the loan which was given secretly to the 1st respondent, without notifying the appellant. The documents used were of the loan which was paid in full since 8/11/2021. The appellant's counsel prayed an appeal to be allowed with costs.

In reply, the counsel for the second and third respondents Ms. Jenifa Silomba, replied first on the introduction party of the submission in chief of the appellant. The counsel submitted that, what has been argued by the counsel for the appellant that, he was denied to produce additional documents not to be considered. The facts are new facts, the counsel cited the case of **Abdul Athuman vs. R.** [2004] TLR 151, that the court not to adjudicate new facts which were not raised and determined.

Responding to the first ground of appeal, she stated that, the appellant agreed that, his wife took a loan from the second respondent. His claim is on attachment of the matrimonial house. The counsel argued that, the appellant consented to mortgage their matrimonial home on page 15 of the proceedings. She cited the case of **Sikudhani Rajabu @Sikudhan and another vs. ECO Bank Tanzania Limited and 4 others**, Land Case No. 7 of 2018 [2021] High Court at Moshi. She insisted that, the appellant consented to mortgage his matrimonial home hence, the sale of it so as to recover the loan is correct. She referred also section 126 of the Land Act, Cap 113 R.E 2019, that in default of the mortgagor the mortgagee may enter into possession.

The counsel went further to insist that, the cited provision by the appellant's counsel section 48(1) (e) of the CPC and the case of **M. S. SYKES Insurance Consultants Company Ltd** (supra) is distinguishable. She cited the case of **Simon Kichele Chacha vs. Aveline M. Kilawe**, Civil Appeal No.160 of 2018 [2021] TZCA at Mwanza, to insist that, parties are bound by their agreement. She referred also the case of **the Private Agricultural Sector Support Trust and another vs. Kilimanjaro Cooperative Bank Ltd**, Consolidated Civil Appeals, No. 171 and 172 of 2017 [2022] TZCA at

Moshi, it was stated that, if you borrow money, you must ultimately pay it back, in most cases with interests.

In the second ground of appeal, the counsel argued that, the appellant agreed to repay the loan on 21/01/2023 on page 15 of the trial court proceedings. The trial court evaluated well the evidence, and the evidence of the respondents was strong evidence, by tendering material evidence to support the case. She referred the case of **Jasson Rweikaza vs. Nvatus Rwechunguru Nkwama**, Civil Appeal No. 305 of 2020 [2021] TZCA [TANZLII], where the provisions of the law were cited section 110, 111 and 3(2) (b) of the Evidence Act [Cap 16 R.E 2022], to cement her position that, the one who alleges must prove, and the prove is on balance of probabilities.

Refuting the third ground of appeal, the counsel argued that, DW1 clearly testified during trial that, the first respondent took the loan in the year 2021, and failed to repay the said loan until 2023, when the case filed. The respondents produced documentary evidence to support their case, and were admitted as exhibit D1 in the trial tribunal. Therefore, the appellant failed to prove his case as per required standard as per section 110 of Evidence Act. She cited the case of **Ziad Mohamed Rasool General Co. L.L.C vs. Joachim Mushi**, Civil case No. 21 of

2020 [TANZLII] to support her position. Having submitted on the grounds of appeal the counsel prayed the appeal to be dismissed with costs.

In rejoinder the appellant's counsel, reiterated what her submission in chief. In the introduction part she argued that, the facts are not new facts. The appellant was denied to tender his additional documents which were received and sealed by the trial tribunal on 24/7/2023, and the respondents' counsel filed the list of additional documents on 26/6/2023 during hearing and the same was admitted. The counsel stated that, the case cited by the respondents' counsel, **Abdul Athuman** (supra) is distinguishable from this situation.

In the first ground of appeal, she added that, the cited case of **Sikudhani Rajab and Another** (supra) is not in favour of the respondents, but it is in favour of the appellant on requirement of spouse consent. There was spouse consent on the already paid debt. She argued further that, the case of **the Private Agricultural Sector Support Trust** (supra) cited by the respondents' counsel is irrelevant in this matter at hand.

On the second ground, she reiterated her submission in chief. She stated that, the case of **Jasson Rweikaza** (supra) cited by the

respondents' counsel is distinguishable from this case. In the third ground she reiterated her submission in chief.

Having gone through the submission made by the parties, and perused the records available, I will start with 2nd ground of appeal. That the trial chairman erred in law and in facts when it failed to evaluate properly the evidence on records which avail that the appellant did not have consent on the said loan and security thereof. That being the case the issue to be answered is whether spouse consent was given.

The law is very specific that, in order for the house to be used as security, especially when the residential house is matrimonial house, there must be spouse consent of either husband or wife. If one of the spouses takes a loan without spouse consent the said loan will be declared invalid when it comes to sale the mortgaged house, in default of the mortgagor. Section 114(1)(a) (b) of the Land Act [Cap 113 R.E 2019] provides:

- 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 spouse 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 mortgagor and the spouse or spouses living in that matrimonial home.

The same thing was stated in the Law of Marriage Act, section 59(1), which 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.

The above provisions are very specific that, it is a legal requirement to have spouse consent before the matrimonial house is used as security for the advanced loan. This was held in the case of **Tanzania Commercial Bank (Formerly known as Twiga Bancorp) and 2 others vs. Mrs Shakila Parves and another**, Civil Appeal No. 284 of 2020 (TanzLii) CAT at Mwanza. The Court stated that, the law is settled, a mortgage of a matrimonial home without a spousal consent is invalid. Also, in the cited case by the 2nd and 3rd respondents' counsel the case of **Sikudhani Rajabu @ Sikudhani and Another** (supra), it was held that:

"The court emphasises that spouse consent is critical when another spouse intend to create a mortgage over the matrimonial home/property and proof of the spouse consent is either by a special form of spouse consent signed by a person whose consent is being sought".

In this case at hand the facts of the case are very clear. There is no dispute that the 1st respondent advanced a loan from the 2nd respondent on 20/2/2021, and that, the said loan is not yet to be paid. Also, it is undisputable that the matrimonial house which is the source of dispute is located at Nsalala, in Mbalizi within Mbeya, that it was kept as security for the said loan. It was alleged that there was a spouse consent, the evidence tendered by the 2nd respondent before trial tribunal (exhibit D1), showing that, the appellant signed the spouse consent form and agreed the matrimonial house to be used as security. At page 11 of the trial tribunal's proceedings, the appellant while being cross examined agreed that, the loan which is the source of the case, he agreed to pay it. But in his defence the appellant denied to have signed the spouse consent as he was in Botswana refer page 8 of the typed proceedings of the trial tribunal. The same allegation was advanced by DW1 at page 16 of the typed proceedings of the trial tribunal who agreed that, the appellant was in Botswana and agreed to pay the loan in 2022.

The respondents' counsel argued well that once there is spouse consent the sale of the matrimonial house in order to recover the loan is valid. She defaulted the provision cited by the appellant's counsel section 48 (1) (e) of the CPC, and the case of **M.S SYKES Insurance Consultants Company Ltd** (supra) would be distinguishable from this case at hand.

The law regarding mortgage is very specific that, the mortgaged house or property is used as security purpose only, and shall not operate as a transfer of any interests or rights in the land from the mortgagor to the mortgagee. However, in case of default, the lender has power to sell the mortgaged property, on the other side the borrower has the right to redeem and discharge his property at any time if the loan is repaid with interests. The issue is borrowers should know that, when they borrow money on the security of a mortgage, they are bound by the terms of agreements they have signed. This was so held in the case by the respondent's counsel, **Simon Kichele Chacha** (supra), which was cited in the case of **Twiga Feeds Ltd and another vs. National Investment PLC**, Civil Appeal No. 295 of 2021. Where it was stated that:

"... what was necessary was the meeting of the minds of the parties to the contract and due compliance to their agreement under section 37(1) of the LCA. In this regard, the courts decisions in **Abualy Alibhai Azizi V. Batia Brother Ltd** (2000) T.L.R 289 and **Simon Kichele Chala** (supra) are relevant".

Hence when there is default in repayment, the mortgaged property may be sold by the lender.

The right to sell the matrimonial house mortgaged wash challenged by the appellant. His challenge will hold water only if the evidence adduced by the respondents did not meet the required standard, by balance of probability. This emanates from the evaluation and analysis of the evidence given. The question which follows is whether the trial tribunal evaluated the evidence on record. It is the well settled position of the law that, onus of proving existence of any facts lies on the party asserting its existence and in civil cases is at balance of probabilities. The provision of the law is very specific under section 110 and 111 of the Evidence Act, cited by the 2nd and 3rd respondents, it provides that:

110 (1) 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.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

111 The burden of proof in a suit proceeding lies on that who would fail if no evidence at all were given on either side.

Therefore, the burden of proof lies on the party who alleges anything in his favour, and the proof of fact in civil cases is on balance of probabilities as per section 3(2) of the Evidence Act. The same principle was stated in number of cases such as in the case of **Jasson Rweikaza** (supra) cited by the 2nd and 3rd respondents' counsel, **Attorney General and 2 others vs. Eligi Edward Massawe and others**, Civil Appeal No. 86 of 2002, and the case **Leonard Dominic Rubuye t/a Rubuye Agrochemical Supplies vs. Yara Tanzania Limited** (Civil Appeal No. 219 of 2018) [2022] TZCA 419 (13 July 2022).

This means that, the one with stronger evidence will have the case decided in his favour. In the case of **Nuru Finance and Business Services Co. Ltd vs. Benjamini Adamson Masuba**, Civil Appeal No. 284 of 2020 CAT [2024] TZCA 169, it was stated that, in civil cases the court is required to sustain such evidence which is more credible than the other on a particular fact to be proved.

In this case at hand, this being the first appellate court, and the appellant claim is that, the evidence was not well evaluated. The law in issue of evaluation of evidence is very specific that once the first trial

court did not evaluate the evidence, the first appellate court is duty bound to evaluate the available evidence before the trial court and to come with its own findings of fact.

There is no doubt that, the trial tribunal evaluated the evidence of both parties as evidenced at pages 4, 5 and 6 of the trial tribunal's judgement. But the first appellate court has the duty to re-evaluate the evidence. In this case at hand the appellant who was the applicant before trial tribunal admitted that his wife (1st respondent) entered into the loan agreement with the second respondent (Kumekucha SACCOS). The 2nd respondent advanced the loan of Tshs. 3,000,000/= to the 1st respondent on 20/2/2021, the same loan to be repaid for twelve months, from 20/2/2021 to 20/2/2022. In his oral evidence the appellant admitted to have signed a spouse consent on the mortgaged matrimonial house. That such loan taken by his wife, he repaid in full. The appellant claimed that, there is another loan agreement entered in secret between the 1st respondent and the 2nd respondent without his knowledge, and he did not sign the spouse consent in the said loan agreement. There was no evidence tendered by the appellant to prove that, there was another loan agreement entered between the 1st and the

2nd respondent. Even though in his evidence he agreed to repay the said loan but he failed to fulfil the promise he made to the 2nd respondent.

The 2nd respondent agreed that, the appellant signed the letter to repay the said loan on 21/1/2023, but he did not do so and this is the source of this case. On the respondents' side also, it is undisputable that, the appellant and the 1st respondent are husband and wife. In her evidence she tendered loan agreement, spouse consent and the letter where the appellant committed himself to repay the said loan, collectively were admitted as exhibit D1. The loan agreement was entered on 20/2/2021. The spouse consent was signed on 15/01/2021. In spouse consent they listed the house located at Nsalala, TV, fridge and furniture as security for the loan advanced to the 1st respondent.

The appellant even though, he denied the tendered exhibit to be admitted as exhibit, on the ground that the tendered exhibit is of the already paid loan, but his objection was found with no merit. But basing on the admitted document it is true that the appellant admitted the 1st respondent to have entered into loan agreement and he signed spouse consent.

Basing on the trial tribunal's record and specifically the documents tendered and admitted as exhibit D1 collectively which were objected by

the appellant, but ruled to be admitted. To be more specific, the spouse consent which is the kernel of this matter. The appellant argued that, he gave a consent to another loan which was fully paid. But he denied to have given consent to the loan in dispute. Although, he agreed that, he would pay the loan so that his residential house could not be sold. Since the appellant denied to have given the spouse consent, I keenly looked at the alleged consent and referred to page 25 of the tribunal's typed proceedings, the appellant prayed before the tribunal that, his wife be summoned, at page 26 the trial tribunal ordered that the wife of the appellant who is the 1st respondent to be summoned. At the very same time, the honourable tribunal chairman ordered the opinion of the assessors to be brought and read on 12th September, 2023. On 12th September, 2023 the assessors read their opinion, nothing stated about the summoning of the appellant's wife who is the 1st respondent and the borrower.

Consequently, in my closer observation of the disputed spouse consent tendered and admitted by the trial tribunal seems to be a photocopy document. Also, the alleged spouse consent apart from being a photocopy, the Commissioner for Oaths attested a copy of the alleged consent and on a different date from the date the appellant claimed to

have signed. The alleged spouse consent shows that it was signed on 15th January, 2021 by the appellant while, the Commissioner for Oaths witnessed it on 20th January, 2021 six days later. Apart from the alleged appellant's signature on the alleged consent, there is a thumbprint pasted on the same document, but it was not described by the respondents in order to ascertain if it is the appellant's thumbprint or otherwise. In my view, describing the thumbprint would have been very useful since, the appellant denied to have given the spouse consent. Considering it in a different paradigm, the Commissioner for Oaths could have been called to testify before the trial Tribunal. In my humble opinion, the evidence of given by the respondents was not did not meet the standard of balance of probabilities.

Additionally, the tribunal did not state anything on the request and subsequent order to call the 1st respondent. In my view, since the appellant requested attendance of the 1st respondent who took the loan, and who submitted the spouse consent which he objected, it would be wise for the tribunal to summon her and the appellant to have an opportunity to cross examine her. The 1st respondent was so necessary to the application before the tribunal, see the case of **Abdullatif**

Mohamed vs. Mehbob Yusuph Othman & Another, Civil Revision

No. 6 of 2017, it was held that:

“In order to find a person necessary party in a suit, there has to be right or relief against such party in respect of the matters involved in the suit and the court must not be in a position to pass effective decree in the absence of such a party”.

From the holding of the Court, the 1st respondent was very vital party as a right of relief to the 2nd respondent, in absence of the 1st respondent the tribunal could not pass a decree. Had it been not that matrimonial house the appellant could have not approached the tribunal. Also, if the appellant could have won in the application before the tribunal, the 2nd respondent should have applied for attachment of another property. Hence, the non-calling of the 1st respondent prejudiced the appellant by denying him a right to cross examine on the spouse consent tendered.

With that, and given the fact that, the appellant is a layman and fended for himself before the trial tribunal, and for the interest of justice to be done as the mortgaged house is a residential house which should not be sold so easily and create homeless families, and in considering the substantive justice, I give the appellant a benefit of doubt and hold that, the spouse consent was not proved to have been given by the appellant. Therefore, the 2nd ground of appeal has merit and it is

sufficient to dispose off the appeal. For that reason, the issue raised is answered in the negative. As a result, I will not unnecessarily prolong this judgment hence, I will not labour on the 1st and 3rd grounds of appeal.

Having done that much, I am of the view that, the appeal has merit and is hereby allowed. Consequently, the judgment and all the orders given by the trial tribunal, are quashed and set aside. The matrimonial/residential house be released from attachment of the District Land and Housing Tribunal of Mbeya. Given, the circumstance of the case, I make no orders as to costs.

It is so ordered.

Right to appeal is explained.

Dated at **MBEYA** this 19th day of June, 2024.

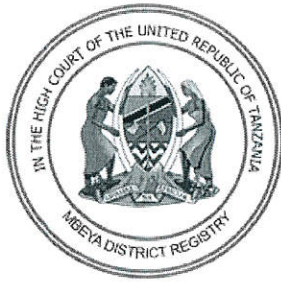



E.L. KAWISHE

JUDGE

Judgment delivered this 19th day of June, 2024 in the presence of Ms. Jenifer Silomba, learned counsel for the applicant also, holding brief

for Ms. Neema Siwingwa, leaned counsel for the appellant and in the presence of Mr. Moses John, the chairman of Kumekucha SACCOS the 2nd respondent.



E.L. KAWISHE

JUDGE