

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMERCIAL CASE NO. 104 OF 2004

CONSOLIDATED HOLDING CORPORATION.....PLAINTIFF  
VERSUS

ABDALLAH MPOKONYA T/A  
MARSHAL CERAMIC WARES ENTERPRISES.....DEFENDANT  
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R U L I N G

KALEGEYA, J:

This is one of the numerous objections levelled by wives against executionary process in respect of properties attached in satisfaction of decretal sums obtained against their husbands for having stood as guarantors and mortgaging their residential premises to secure facilities without their consent.

Mr. Luanda, Advocate, represented the Decree – holder/1<sup>st</sup> Respondent while the Applicant/objector was on her own.

The following stand undisputed. Sometime in 1989, the 2<sup>nd</sup> Respondent/Judgment-debtor and who is the husband of the Applicant/objector, and trading as **Marshal Ceramic Wares Enterprises** secured a loan in two tranches of shs.5,409,000/= each, payable in 5½ years. He subsequently obtained also overdrafts of shs.1,000,000/= (2/7/92), shs.2,000,000/= (30/1/93) and shs.3,987,822/= (9/7/93). The facilities having been not serviced, on 28/3/2002 the 1<sup>st</sup> Respondent/Decree – holder filed a suit claiming shs.45,732,532/= being the outstanding liability and

interest. On 1/4/2004, the suit was settled through mediation in terms as contained in the following consent settlement order:-

- “1. That the Defendant shall pay to the Plaintiff a total sum of shs.17,103,181.60 in full satisfaction of the liability.*
- 2. That the said sum shall be paid in twelve monthly equal instalments of shs.1,425,265.00 commencing on 30/6/2004.*
- 3. Each party to bear own costs.*
- 4. The usual default clause to apply.”*

I should hastily add that as a collateral, the 2<sup>nd</sup> Respondent/Judgment – debtor mortgaged his property on plot No. 76 block “D” Mbagala with certificate of title No. 34904.

The said 2<sup>nd</sup> Respondent/Judgment debtor having failed to honour the terms of the consent settlement order, the 1<sup>st</sup> Respondent/Decree – holder filed executionary proceedings and secured attachment order of the mortgaged property. An order for Proclamation for sale was issued on 13/1/2005.

The sale under that proclamation for sale was to take place on 27/2/2005. Meanwhile, on 9/2/2005, the objector/Applicant filed the objection charging that the property is matrimonial property and that it was mortgaged without her consent and that therefore the attachment order should be raised. She supported her application by her own affidavit.

It is further not disputed that the said property is in the 2<sup>nd</sup> Respondent's name, a factor strongly relied upon by the 1<sup>st</sup> Respondent/Decree – holder as portrayed in one Shabani's counter – affidavit. The said Shabani is the 1<sup>st</sup> Respondent's Principal Officer.

The above said, during the hearing, each party adopted the respective affidavit and counter – affidavit. In her lay status, the applicant flatly maintained that the property in question is a matrimonial home, where they reside and that therefore her consent should have been secured first.

On the other hand, Mr. Luanda, Advocate, impressed that though lay, the objector should have had s. 59 of The Law of Marriage Act, in mind, adding that however, that section should be read together with s. 33 of The Land Registration Ordinance making reference to **Hadija Mnene vs Ally Maberi Mbaga and NBC, HC Civil Appeal No. 40 of 1995 (Mwanza Registry)** and insisting that there was no way the 1<sup>st</sup> Respondent would have known of the alleged incumbrance.

Commenting on s. 112 (3) of The Land Act, Act No. 4 of 1999 before it was repealed and s. 114 of the same Act as amended by Act 2 of 2004, when so asked by the Court, Mr. Luanda insisted that the loan was taken before the said Act came into effect and it is not retrospective hence does not cover the matter before us.

Mr. Luanda went further to submit that the application is misconceived as it has already been overtaken by events in that the sale has already been completed.

I will start with Mr. Luanda's last submission. The record is clear and in objector's favour. She filed her application on 9/2/2005 and the sale was to be held on 27/2/2005. If the sale was held at all (and I am saying this because although there is a proclamation for sale there is no evidence on record that the sale ever took place as alleged by Mr. Luanda) it was after the objector had filed her application.

Regarding s. 112 (3) of Act 4 of 1999 before it was repealed, and s. 114 which replaced it vide Act 2 of 2004 and which mandatorily require a spouse's consent for any disposition by way of mortgage, I agree with Mr. Luanda that as the transaction took place in 1989 while the Land Act became effective on 1/5/2001 (Act 2/2004 became effective on 1/10/2004) the present transaction is not covered. In any case, s. 183 of the Land Act protects transactions entered into before the Act. The said section provides, in part: -

*"183 (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.*

- (2) *Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.*”

Now, turning to the merits, indeed the governing provision on matrimonial homes is s. 59 of the Law of Marriage Act. Under this provision (s.59 (1)), a matrimonial home, while the marriage subsists, cannot be alienated, by, among others, a mortgage unless the other spouse’s consent is secured.

Under s. 59 (2), if the alienation is made in violation of s. 59 (1) the other spouse shall continue to live in the matrimonial home until marriage is dissolved or there is a Court decree for separation, maintenance or otherwise, unless

*“the person acquiring the estate or interest can satisfy the Court that he had no notice of the interest of the other spouse and could not by the exercise of reasonable diligence have become aware of it.”*

In this matter, the mortgaged property is a matrimonial home and the objector’s consent was not secured. However, it is clear that in the absence of a caveat there was no way the 1<sup>st</sup> Respondent/Decree holder could have known of the existence of the objector’s interest however diligent they

would have been. The Highest Court of the Land, the Court of Appeal, in **Idda Mwakalindile vs NBC (CAT) Civil Appeal No. 591/2000 (Mbeya Registry)** held that in the absence of a caveat the mortgagee would not be in position to know of such interest. There was none here and therefore s. 59 (2) does not protect Objector/Applicant. It would have been a different matter if the Land Act had applied.

For reasons stated, the application stands dismissed.

**L.B. KALEGEYA**  
**JUDGE**

Delivered in the presence of Mr. Luanda, Objector and 2<sup>nd</sup> Respondent/Judgment debtor.

**L.B. KALEGEYA**  
**JUDGE**  
**18/3/2005**

1,181 words

I Certify that this is a true and correct  
of the original order Judgement Rulling  
Sign M. Keenle  
Registrar Commercial Court Dsm.  
Date 18/3/2005