IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT IRINGA

LAND CASE APPEAL NO. 12 OF 2007
(From the Decision of the District Land and Housing Tribunal of Iringa at Iringa in Application No. 37 of 2006)

CRDB BANK LIMITED ..... 1ST APPELLANT
KASSIM MWALONGO ..... 2ND APPELLANT
VERSUS
JENIFA BARAKAEL LYIMO ..... RESPONDENT

JUDGMENT

MWAMBEGELE, J.:

By an Overdraft Agreement dated 27th May, 1997, CRDB Bank Limited; the 1st Appellant extended a loan facility of ten million shillings to one Anselem W. Mauki; allegedly the husband of Jenifa Barakael Lyimo; the Respondent. A house standing on Plot No. 371 Kihesa in the Iringa Municipality, which is the subject matter of this case, was put as collateral. The said Anselem W. Mauki defaulted to pay the loan as a result of which the mortgaged house was sold through auction by Majembe Auction Mart to Kassim Mwalongo; the 2nd Appellant. The Respondent successfully sued Anselem W. Mauki,

the 1st Appellant, the 2nd Appellant and Majembe Auction Mart in the District Land and Housing Tribunal claiming that her husband; the said Anselem W. Mauki, had obtained the loan without her knowledge and that the mortgaged house was a matrimonial home. The District Land and Housing Tribunal ruled that the sale of the mortgaged house was null and void and the Respondent was declared a legal co-owner of the house in dispute. This decision did not make the two Appellants happy. They thus, through the Services of Mr. B. P. Mkwata, learned Advocate, have appealed to this court advancing five grounds of appeal, namely:

1. The Chairman of the Tribunal erred in law in holding that the Respondent was a wife of Anselm Mauki in the absence of credible evidence to support such a finding;
2. (a) The Chairman of the Tribunal erred in law in holding that the Respondent (Jenifa Barakael Lyimo) was a co-owner of the suit premises;

   (b) The Chairman of the Tribunal erred in law when he failed to hold that the reliefs craved for by the Respondent were unmaintainable and not available to the respondent;

3. The Chairman of the Tribunal misdirected himself when he relied on the provisions of Section 161 (3) (a) and not 161 (2) (a) of the Land Act, Cap 113 which had no application to the facts of this case;
4. (a) The Chairman of the Tribunal took it upon himself to complain on behalf of Anselem W. Mauki that he was not served with a notice to sell the mortgaged house as required by Section 131 (2) of the Land Act;

   (b) Section 131 (2) of the Land Act had no any application to the facts of this case; and
5. The Chairman's declaratory order to the effect that the sale of the purported mortgage was null and void is ambiguous.

The Respondent, in her Reply to the Petition, challenges the appeal asserting that the District Land and Housing Tribunal was justified to reach the verdict it reached. She prays that the appeal be dismissed with costs.

The Appeal was argued by way of written submissions. The Appellants, as aforesaid, are represented by Mr. B. P. Mkwata, learned Advocate while the

Respondent, after rescinding the services of Mr. Onesmo Francis on 12th June, 2007; well before the trial, argued the appeal by herself.

In his Written Submission in support of the Appeal, Mr. B. P. Mkwata, learned Advocate decided to abandon the 5th ground of appeal. He argued the 1st and 2nd grounds separately while the 3rd and 4th grounds have been argued together.

On the first ground of appeal, Mr. B. P. Mkwata, learned Advocate is challenging the credibility of PW2, PW3 and PW4 submitting that their testimony was too casual to prove the existence of the marriage between Anselm W. Mauki and the Respondent. Mr. B. P. Mkwata submits that their testimony at most established that the Respondent was living in the suit house but that this was far from proving that she was indeed the wife of Anselm W. Mauki.

On the second ground of appeal, Mr. B. P. Mkwata, learned Advocate, submits that it is not disputed that the suit house was registered in the sole names of Anselm W. Mauki thus, assuming the Respondent was the wife of the said Anselm W. Mauki, such status in itself did not confer her with co-

ownership of the suit premises under the guise of Section 59 (1) of the Law of Marriage Act, Cap. 29 of the Laws of Tanzania. The learned Advocate further submits that the Respondent ought to have registered her interest by filing a caveat as was the case in ***Hadija Mnene Vs Ally H. Mbaga and NBC,*** Civ. App. No. 40 of 1995 Mwanza Registry (Unreported), ***Aida Kyenkungu Vs John Kyenkungu & 2 others,*** Civil Case No. 57 of 2001 HC at Dar es Salaam (unreported) and **Joyce *B. Mpinda Vs CRDB Bank Ltd & Others*** Comm. Case No. 67 of 2000 Dar es Salaam (unreported). Mr. B. P. Mkwata submits that the Respondent had neither registered her deemed interest in the suit premises nor did she register a caveat with the Registrar of Titles to protect her interest in the alleged matrimonial property.

Mr. B. P. Mkwata has argued the 3rd and 4th grounds together submitting that Sections 161 (3) (a) and 131 (2) of the Land Act, Cap 113 were not applicable as the Land Act, Cap 113 was enacted after the transaction in the present matter and it was not meant to operate retrospectively. Further, Mr. B. P. Mkwata submits that the Chairman had taken upon himself to complain on behalf of the Anselm W. Mauki who had not lodged any

complaint to that effect and had not defended the suit for the obvious reason that the Respondent was acting as his agent after himself had lost the suits he had filed in court. Mr. B. P. Mkwata submits further that this complaint was not canvassed in the issues therefore, he submits, the Appellants were condemned unheard on this point.

In Reply to the Appellant's written submission, the Respondent submits that she brought two witnesses to testify and had actually testified and confirmed that she was a wife of Anselm Mauki. That, the presumed marriage has been blessed with three issues – Lucy Anselm Mauki, Bruno Anselm Mauki and Berna Anselm Mauki. The Respondent has cited to me the Provisions of Section 160 of the Law of Marriage Act, Cap 29 of the Laws in support of this argument. She submits further that the cases cited by the Appellants are distinguishable from the circumstances of the present case. The Respondent reiterates her prayer that the appeal be dismissed with costs.

In a short rejoinder, Mr. B. P. Mkwata, learned Advocate, on behalf of the Appellants, challenges the Respondent's submissions and reiterates what is

stated in the Petition of Appeal and written submission in support of the appeal and prays that the appeal be allowed with costs by setting aside the decision of the Tribunal.

In deciding, I shall deal with the grounds of appeal in the order and manner dealt with by Mr. B. P. Mkwata; that is, dealing with the 1st and 2nd issues separately and dealing with the 3rd and 4th grounds together in the order they appear.

The issue for determination on the first ground is whether or not, on evidence availed to the Tribunal, the Respondent was the wife of Anselm Mauki. This issue was among the issues framed but unfortunately, it was not properly canvassed at the trial and in written submissions of both parties. The Respondent and her three witnesses did not sufficiently direct themselves to this issue and in my view, for reasons that will be obvious shortly, rightly so. In cross examination by Mr. Mkwata, so far as is relevant to this ground, the Respondent is recorded to have said:

> *"I was married to [the] 1st respondent in 1986 in [a] traditional marriage in Uchaga in the presence of both sides of our parents and*

*elders... after our marriage we lived in Dodoma and I am now living in Iringa ... I was the one who was evicted from the suit house"*

To my understanding, what is evident from the above quotation is that the Respondent is averring that she contracted a customary marriage with Anselm Mauki. In the very cross examination, the Respondent testified that they (the Respondent and Anselm Mauki) had a divorce case in the Primary Court at Dodoma. It is not anywhere in the proceedings where the Respondent is claiming to have been living and cohabiting with Anselm Mauki without any recognised marriage as to bring the provisions of Section 160 of the Law of Marriage Act, Cap. 29 of the Laws of Tanzania, into play. It is not surprising therefore that neither the Respondent herself nor the three witnesses she fielded in support of her case have, in a bid to prove a presumed marriage, belaboured to testify as to the time the two have been living and cohabiting together. The Respondent's witnesses have been referring to Anselm Mauki as simply her husband. None of them; and in my view rightly so, testified in respect of a presumed marriage between them as that, it seems to me, was not the issue they were to testify on. It was a non issue.

The Chairman, on this issue is recorded at page 4 of his judgment to have said:

> *"I have been convinced by the evidence of witnesses ... that the Applicant is a legal wife of the 1st Respondent* ***as it has been established that they were living in the suit house for years together as a family."*** *(Emphasis mine).*

The second part of the above quotation is the one that has unnecessarily invited controversy in the present case as it brings in the notion of a presumption of marriage while the first part presupposes the existence of a marriage other than the presumed one. That is the reason why the parties have wrongly embarked on submitting in its respect. The provisions of Section 160 of the Law of Marriage Act, Cap. 89 of the Laws of Tanzania come into play in situations where the parties allege that they never went through any recognised marriage except that they have been cohabiting and living together for more than two years as to have acquired the reputation of being husband and wife. For ease of reference, Subsection (1) of this provision reads:

> *"Where it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married".*

In my considered view, this provision is not applicable in the circumstances of this case. The Respondent's word in this respect is that she contracted a customary marriage with Anselm Mauki in "Uchaga" in the presence of both sides of their (the Respondent's and Anselm Mauki's) parents and elders which allegation has not been challenged. In the absence of any evidence challenging this allegation and being alive to the fact that a presumed marriage was a non issue before the Tribunal and to the witnesses, it is my considered view that the Respondent was a lawful wife of Anselm Mauki through a customary marriage. The question of a presumed marriage has been unnecessarily brought in by the judgment of the Tribunal thereby creating unnecessary confusion. In the premises, the first ground of appeal fails.

The above conclusion takes me to the second ground of appeal. Mr. B. P. Mkwata perceives that even by holding that the Respondent was the wife of the said Anselm W. Mauki, such status does not, in itself, confer the Respondent with co-ownership of the suit house it being registered in the sole names of Anselm W. Mauki; the husband. He thinks it was incumbent upon her to register her interest as was the case in the authorities cited to me. Mr. Mkwata is correct. Before the enactment of the new Land Act, Cap. 113 (R.E 2002), there has been case law established to the effect that in order for a spouse to rely on the provisions of Section 59 (1) of the Law of Marriage Act, Cap. 29, the said spouse must register a caveat to protect the interest. A celebrated authority to this effect is the decision of the Court of Appeal in ***Mtumwa Rashid vs Abdallah Iddi & Another*** (C.A. No.22/93) quoted in ***Evelyn Magembe Cheyo Vs Furaha Financial Ltd and 2 Others***, HC Commercial Case No. 15/2000. In that case, referring to Section 59 (1) of the Law of Marriage Act, Cap. 29, the Court of Appeal held:

> *"Upon a true construction of this provision, we think that it applies only to cases where the matrimonial home is owned wholly by the spouse who is contemplating to alienate*

*it ... if the matrimonial home is alienated without the consent of the other spouse, then the non consenting spouse shall be deemed to have an interest therein capable Of being protected by caveat or caution ..."*

The above principle has been followed in a number of cases; most notably is ***Hadija Mnene Vs Ally H. Mbaga and NBC,*** Civ. App. No. 40 of 1995 HC Mwanza Registry (Unreported) in which Lugakingira, J. (as he then was) held:

*"A prudent spouse would seek to protect that interest by actually causing a caveat to be registered ... A bare interest in an estate would not operate to prevent its alienation where registered land is involved. It is therefore incorrect to think that the mere existence of S. 59 (1) is sufficient to protect an estate from being sold ... or mortgaged".*

The principle was also followed in **Joyce *Beda Mpinda Vs CRDB Bank Ltd & Others*** Comm. Case No. 67 of 2000 Dar es Salaam (unreported), ***Evelyn Magembe Cheyo Vs Furaha Financial Ltd and 2 Others***, HC Commercial Case No. 15/2000 and **Aida *Kyenkungu Vs John Kyenkungu & 2 Others,***

Civil Case No. 57 of 2001 HC at Dar es Salaam (unreported) to mention but a few cases.

This principle was again well articulated by the Court of Appeal in ***Idda Mwakalindile Vs NBC Holding Corporation and Another***, Civil Appeal No. 59 of 2000. The facts of that case are quite akin to the facts of the present case. In that case, like in the case at hand, a matrimonial house was put as collateral by a husband without the knowledge of a spouse. The mortgaged house was in the sole names of the husband. The husband failed to repay the loan as a result of which the same was auctioned to another person. The wife sued the husband, the Bank and the buyer of the mortgaged house. The Court of appeal, after quoting the provisions of Section 59 (1) of the Law of Marriage Act, Cap. 29 held:

> *"Under this provision, it is beyond dispute that a matrimanial house owned by the wife or husband ought not be alienated by way of sale mortgage ... without the consent of the other spouse. ... the Bank was not aware that the house was a matrimonial property. It was not registered in the name of the [husband] ... For that reason, the Bank had no reason not to believe that the house*

*belonged to the [husband]. ... The [spouse] had registrable interest in the house, which, as provided under this section, could be protected by a caveat."*

The court of Appeal went on:

*"... there being no caveat to protect the registrable interest of the [wife], ... there was no way in which the [Bank] ... could know that the house was a matrimonial property. ... The house as mortgaged, provided the security for the repayment of the loan ... the mortgaging and alienation of the house was not null and void in contravention of section 59 (1) of the Law of Marriage Act, 1971 ".*

These decisions of the Court of Appeal (supra), in my view, settled the law on the non involvement of a spouse in mortgaged houses in the sole names of the spouse without the knowledge and consent of the other spouse before the enactment of the present Land Act, Cap 113. This case law has now been codified in the present legislation. The present legislation provides in Section 112 (3) (a):

> *"A mortgage of a matrimonial home, including a customary mortgage of a matrimonial home, shall be valid only if–*
>
> > *(a) any document or form unused in applying for such a mortgage is signed by, or there is evidence from the document that it has been* ***assented to by, the borrower and any spouse of the borrower living in that matrimonial home"*** (emphasis mine).

In the present case the Respondent conceded that she did not register any caveat to protect her interest. In the light of the foregoing authorities, the mortgage of the house in dispute was valid. I am aware of the fact that the Respondent had a draft caveat to this effect which appears in the court file. But she did not register the same with the Registrar of Titles. In the **Joyce *Beda Mpinda*** case Bwana, J. (as he then was) faced with a similar circumstance, had this to say:

> *"... [the] interest has to be protected by a caveat. That interest has to be protected by a caveat. That caveat has to be registered with the Registrar of Titles otherwise the mortgagee has no other legal way to know of the same".*

I can say no better words than those of Bwana, J. (as he then was). In my considered view, a caveat not registered with the Registrar of Titles is not a caveat within the meaning envisaged by the provisions of 59 (1) of the Law of Marriage Act, Cap. 29; its value is as good as a piece of paper on which it is written. This disposes of the second ground of appeal. The second ground of appeal succeeds.

I still have the last two grounds of appeal to tackle. As aforesaid, the 3rd and 4th grounds will be tackled together. On these grounds of appeal, it is submitted by Mr. B. P. Mkwata that Sections 161 (3) (a) and 131 (2) of the Land Act, Cap. 113 were not applicable to this case as the Land Act, Cap. 113 was enacted after the transaction in the present matter and that it (the Land Act) was not meant to operate retrospectively. He has quoted the provisions of Section 111 (1), 161 (3) (a) and 131 (2) in support of this point. With due respect to Mr. B. P. Mkwata, not all provisions complained of fall under Part X of the Land Act, Cap. 113. Section 161 (3) (a) complained of does not fall under Part X of the Land Act, Cap. 113. In the premises, it is not proper to cite the provisions of section 111 (1) in support of this point.

However, admittedly, the Land Act, Cap. 1113 was enacted in 1999 and came into force on 1st May, 2001 vide GN No. 485 of 2001 well before the transaction that gave birth to this appeal. In the absence of any provision in the legislation suggesting retrospective application of the same, the new legislation cannot be applicable to this case.

Mr. B. P. Mkwata submits further, that the Chairman had taken upon himself to complain on behalf of Anselm W. Mauki who had not lodged any complaint to that effect and had not defended the suit for the obvious reasons that the Respondent was acting as his agent after he himself had lost the suits he had filed in court. To this, I would say that the court is not barred, at any stage, even if *suo motu*, to raise any matter whatsoever that will help it in reaching a reasonable decision, provided that by so doing no injustice is occasioned. Even if the matter was not canvassed in the issues, I do not see any problem in as much as justice, as in the case at hand, has not been occasioned. The Appellants cannot, in the circumstances, complain to have been condemned unheard on this point. Mr. Mkwata has alluded to another issue: that the Respondent was acting as an agent of

Anselm Mauki after he had lost the suits he had filed in court. With due respect to Mr. Mkwata, the evidence available before me does not have anything in support of this allegation. I take it to be a counsel's word in his submissions which is not supported by any scintilla of evidence. The counsel's word cannot be a substitute of evidence.

In the final analysis, except for some exceptions appearing hereinabove, this appeal succeeds. The transaction in the present case was valid. In consequence whereof, the auctioning of the mortgaged house to the second appellant was equally valid. The decision and order of the District Land and Housing Tribunal are vacated. This appeal is allowed with costs. It is so ordered.

DATED at DAR ES SALAAM this 21st day of August, 2012.

**J. C. M. MWAMBEGELE**
**JUDGE**