

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

LAND APPEAL NO. 18 OF 2021

*(Appeal from the Judgment of the District Land and Housing Tribunal for Kinondoni
at Mwananyamala dated the 1st day of November, 2019 in Application No. 375 of
2014)*

JOLY FINANCE LIMITEDAPPELLANT

VERSUS

SUBIRA SAID MGANGA 1ST RESPONDENT

NURU RAMADHAN NASSIB 2ND RESPONDENT

DAVID MALIYAGA MKAMBALA alias DAVID HASSAN

MALIYAGA T/A MALIYAGA ESTATE AGENT.....3RD RESPONDENT

ZAYUMBA YUSUFU MGANGA4TH RESPONDENT

GESS INVESTMENT CO.LTD 5TH RESPONDENT

Date of the last Order: 26.11.2021

Date of Judgment: 14.12.2021

CORRECTED JUDGMENT

A.MSAFIRI, J

The appellant was aggrieved with the decision of the District Land and Housing Tribunal (DLHT) in Land Application No. 375 of 2014 before Hon. R. Mbilinyi, Chairperson dated 01/11/2019, and he decided to lodge an appeal to this Court.

The brief facts of the institution of Land Application No.375 of 2014 before the DLHT are that, on 15.02.2014 the appellant had issued the loan of Tzs 20,000,000/- to the 2nd respondent which was secured by the mortgage property registered under residential License No.0003319, in

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the name of Zayumba Yusufu Mganga, located at Manzese Kinondoni Municipality, Dar es Salaam City.

The 4th respondent as a guarantor had disclosed his marital status that he was married, and he submitted an affidavit of his spouse's consent to the appellant for issuance of the loan.

Unfortunately, the 2nd respondent failed to repay the loan amount as agreed therefore the appellant wanted to exercise her power of sale of the mortgaged property. It is from that basis the 1st respondent instituted Land Application No. 375 of 2014 against the appellant and 4th respondent herein and others, alleging among other things that she being the legal wife of the mortgagor, in law, her consent was of great importance before embarking on the mortgage transaction. The suit ended in favor of the 1st respondent herein. Being aggrieved with the decision of the DLHT the appellant lodged this appeal before this court, on the following grounds:

- 1. That the tribunal erred in law and in fact for failure to evaluate the evidence adduced by the appellant regarding the spouse consent. The tribunal failed to identify the one who signed the said spousal consent, the thumb print affixed thereto and the authenticity the said signature vis-à-vis the picture affixed thereto.*
- 2. The tribunal erred in law and fact for holding the mortgage between the Appellant and 4th respondent is unlawful on the ground that the 1st respondent did not sign the loan agreement. The loan agreement was between the appellant and the 2nd respondent and it was not necessary for the 1st respondent to sign it.*

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3. *The tribunal erred in law and in fact for failure to decide on the right of the Appellant to recover the loan from the 2nd and 4th respondents.*
4. *The Tribunal erred in law and in fact for to order (sic) the 2nd respondent (the borrower) and 4th respondent (the mortgagor) to repay the Appellant the money that was advanced to the 2nd respondent.*
5. *That the tribunal erred in law and in fact for failure to observe mortgage was properly obtained as it was supported by spousal consent.*
6. *The tribunal erred in law and in fact for failure to take into consideration the spousal consent obtained by the lender that allowed the pledging of the matrimonial asset as the security for the loan advanced to the borrower.*

Thus, the Appeal be allowed with costs and the decision of the DLHT for Kinondoni be quashed and set aside.

On 20.10.2021 when the matter came for mention the appellant was represented by Gabriel Munishi, Learned Advocate who informed this court that the 3rd respondent is dead, and therefore prayed for the case to abate against him under Order XXII Rule 4(3) of the Civil Procedure Code Cap 33 RE 2009. The prayer was granted.

The appeal was heard by way of written submission in which the appellant was represented by Gabriel Aloyce Munishi learned Advocate whereas the 1st respondent was represented by Stephen Ally Mwakibolwa, learned Advocate, the 4th respondent was represented by M.R.Kiondo, Learned Advocate, the 2nd and 5th respondent did not enter appearance despite of *AcUs.*

the different means of serving including publication in the Mwananchi newspaper of 26.10.2021 and the appeal was heard in their absence.

Counsel for the appellant submitted that the due diligence was done by the appellant in which the 4th respondent submitted to the appellant, the affidavit for spouse consent, showing that his wife had consented for their matrimonial home being used to secure the loan amount which was advanced to the 2nd respondent. Hence that there was no way the appellant could have disbelieved the applicant (4th respondent).

He further submitted that Section 8 of the Mortgage Financing (Special Provisions) Act, 2008 states that:-

"Section 114 of the principal Act is amended by repealing subsection (2) and substituting for it the following new provisions;

(2) For the purposes of subsection (1), it shall be the responsibility of the 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 was spouse or any other third-party holding interest in the mortgaged land"

Atts.

Mr Munishi contended that the Tribunal erred in law for failure to evaluate that it was the mortgagor who had the responsibility to disclose if he has spouse or not, and that the mortgagee shall be deemed to have discharged his responsibility for ascertaining the marital status of the applicant and any spouse identified by the applicant by affidavit or any written and witnessed document. And that the Applicant (Zayumba Yusufu Mganga) had declared to have a spouse having interest in the mortgage where he submitted Exhibit "D" which was an affidavit of the spouse consent.

He submitted further that upon receiving the said affidavit from the 4th respondent it was quite proof that the appellant had discharged his responsibility and ought not to have gone beyond the affidavit to investigate the affidavit whether it was of the genuine spouse of the mortgagor or otherwise.

Supporting his argument Mr Munishi cited the case of **Charles Isack Ndosu vs Marry Andriano Zalalila and Others**, Land Case No. 279 of 2013 (Unreported) which stated the provision of **Section 114(3) of the Land Act, Cap 113** [R.E.2019]

Again, that the 1st respondent was aware of the mortgaged property basing on the affidavit brought by her husband (4th respondent)

Counsel for the Appellant, further referred section 19 of the Mortgage Financing (Special provisions) Act, 2008 which provides: -

"(2) Notwithstanding subsection (1), upon receipt from the mortgage applicant and any other third party having interest to the mortgage including any spouse identified by the mortgage applicant,

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of a signed and witnessed statement that they have understood and consented to the terms and conditions of the mortgage as their own free act and deed, a mortgagee shall have satisfied obligations under subsection (1) and no mortgagee shall be required to make further inquiry regarding such matters and no claim of undue influence shall be permitted as a defence against enforcement of a mortgage or exercise of a power of sale by or on behalf of any person signing the document”.

He further argued that the trial Chairman failed to evaluate on how the mortgagee would have doubted the signature and the photo affixed on the affidavit of the 4th respondent's spouse (1st respondent), brought by the 4th respondent himself introducing his wife to the appellant on oath to have consented the mortgaged property.

Counsel cited the case of **Hadija Issa Arerary vs Tanzania Postal Bank, Civil Appeal No. 135 of 2017 (unreported)** where Mziray J.A stated; -

"As have stated the contents of an affidavit were not challenged and the respondent acted on the strength of that affidavit then there was no reason that could prevented her from disbursing the loan. We therefore subscribe to the findings of the first court at page 95 of the record of appeal where it stated that; -

"the same person has never denounced his affidavit. 

It was the trial District Tribunal which declared that the affidavit defective as if the issue before the tribunal was on the legality of the affidavit. The affidavit whether defective or not had already completed its work, namely to convince and lure the mortgagee to advance loan to the 1st respondent"

Mr. Munishi stated that the trial Chairman erred in law and in fact for failure to invoke the principle of the "***Doctrine of Estoppel***" which prevents someone from asserting something contrary to the previous action or statement of that person. Hence that the 1st and 4th respondents are estopped from denying their previous statement on oath which is Exhibit D. This is as per Section 123 of the Law of Evidence Act Cap 6 [R.E. 2019] which provides; -

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing."

Basing on the submissions, counsel for the appellant prayed for this court to allow the appeal.

In response, Counsel for the 1st respondent contended that the issues in the trial Tribunal were correctly resolved by the trial Chairman in favour of the respondents basing on the ground that the appellant did not have a consent of the 1st respondent in discharging their duties as far as this transaction goes. *Alle*

Also, that, **Exhibit D** of spousal consent was neither signed by the 1st respondent and the photo affixed to it did not belong to the 1st respondent. Hence that the affidavit was not genuine consent in the current case.

Mr Mwakibolwa for the 1st respondent contested the position in the case of **Hadija Issa Arerary Vs Tanzania Postal Bank, Civil Appeal No. 135 of 2017 (unreported)** that it is distinguishable from the case at hand where the affidavit is contested unlike in the cited case the affidavit was not denounced by the maker.

Mr Kiondo for the 4th respondent also in reply, contended that the trial Tribunal was very correct to decide in their favour because the 1st respondent has proved that she was the legal wife of the 4th respondent (Mortgagor) that in law her consent was of great importance before embarking on the purported mortgage transaction to the 4th respondent.

He listed number of authorities regarding to the consent of the 1st respondent as the wife. He cited **Section 2 of the Law of Marriage Act, Cap 29 [R.E. 2019], Section 112 of the Land Act, 1999, Cap 113 R.E. 2019, Section 114 (1) (a) and (b) (2) of the Land Act Cap 113 , R.E. 2019, and Section 8(2) of the Mortgage Financing Act (Special Provisions) Act No. 17 of 2008.**

He pointed that the appellant has failed to establish that 1st respondent was the one who deponed the purported affidavit/spouse consent Exhibit D.

Mr. Kiondo cited the case of **Hemedi Said Vs Mohamedi Mbilu [1984] 113** that a person whose evidence is heavier than that of the other is the

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one who must win. And that in the instant case the evidence of the 1st respondent is heavier than that of the appellant.

In rejoinder, Counsel for the appellant contended that the appellant had exhausted her duty before embarking the mortgage transaction. And that it is the 4th respondent who brought the sworn affidavit to the appellant with information that it belonged to his legal wife, and there was no way the appellant could have disbelieved him.

On cementing to the same he cited the case of **Anitha Muhidini Mboya Vs Joseph Nemes Makoi and Others** (Civil Case No. 95 of 2017 (unreported) where Hon. A.K. Rwizile J stated that;

"I am also tempted to believe that if indeed the plaintiff did not send the same to the bank, then her husband did. Therefore, no reason she was not aware of the transaction."

Therefore, he concluded that the affidavit was clearly signed by the 1st respondent and submitted by the 4th respondent for issuance of the loan. Hence that this appeal be allowed.

As the grounds of appeal as have been generally argued by the appellant, I will also respond to the same generally and by determining the issue as *to whether the trial tribunal was right to decide in favour of the respondents on the ground that the 1st respondent consent was not obtained before embarking the mortgage transaction.*

In determining the issue above I would like to put it very clear that the spouse consent is of great importance in all matters that affects matrimonial properties and matrimonial home as per section 59 of the Law of Marriage Act Cap 29, Section 114 (1) (a) and (b) (2) of the Land

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Act Cap 113, and Section 8(2) of the Mortgage Financing Act (Special Provisions) Act No. 17 of 2008.

Having said that, one should consider the duties of each side between the appellant and respondent in the effectiveness of the spouse consent as per section 114(2) of the Land Act Cap 113 R.E. 2019 Which provides: -

*"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**" (Emphasis added).*

From the above provision the mortgagor was the 4th respondent who convinced the appellant to issue the loan secured by the suit property. The 4th respondent had a mandatory duty to disclose to the appellant whether has spouse or not. From the records it is undoubted the 4th respondent discharged that duty to the appellant.

Upon such discharge the appellant also had a mandatory duty to take reasonable steps to verify whether the applicant (mortgagor has or does not have a spouse.

In the discharge of that duty the Regulation 4(1) (c) of the Land (Mortgage) Regulations, 2005 provides; -

"If the applicant states he or she is not married and the mortgagee has reason to believe that, the statement might be

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incorrect, the mortgagee may require the applicant to produce an affidavit to the effect that the applicant is not married."

However, Section 114 (3) of the Land Act Cap 113, [R.E. 2019] provides;

"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 was spouse or any other third-party holding interest in the mortgaged land."

In this case the appellant had required the 4th respondent to bring an affidavit to prove whether he has spouse or not and the 4th respondent submitted what is referred as Exhibit D which is spousal consent to the appellant. That was the highest exhaust of duty owed to the appellant as per the provision of the law. If the information in the affidavit were false, then that was not the appellant's fault.

With that information in the affidavit, the mortgagee had no reason to disbelieve the 4th respondent. I subscribe the position in the case of **Hadija Issa Arerary Vs Tanzania Postal Bank, Civil Appeal No. 135 of 2017 (unreported)** at page 10 where the Court of Appeal stated:-

"...it is undisputed that the mortgagor provided an affidavit proving that he was single. With that information, the mortgagee had no reason to disbelieve him"

However, section 123 of the Evidence Act, Cap 6 R.E.2019 provides; -

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a

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thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing."

So long as, it is the 4th respondent who intentionally submitted the spouse consent through the affidavit to the appellant, convincing the appellant to believe the contents of the affidavit so that to enter into mortgage transaction agreement, *it cannot well be said later that the 4th respondent had mistaken his wife*. He cannot later be given chance to deny what he intentionally did or omit to do.

Having said that, I find the trial Tribunal misdirected itself in evaluating the facts in relation to the law which led to the decision in favour of the 1st respondent.

I hereby quash and set aside the decision and decree thereon of the District Land and Housing Tribunal for Kinondoni District at Mwananyamala in Application No. 375 of 2014.

I allow the appeal with no costs. Right of Appeal explained.

It is so ordered.

Dated at Dar es Salaam this 14th day of December, 2021.



A. MSAFIRI
JUDGE