IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE No. 140 OF 2020

1. MARYAM NASSOR ---------- PLAINTIFF

Versus

1. ABLA ESTATE DEVELOPERS & AGENCY LIMITED
2. NASSOR KHALIFA
3. AHMED NASSOR KHALIFA
4. KCB BANK TANZANIA LIMITED ---------- **DEFENDANTS**

JUDGMENT

05.11.2021 & 09.11.2021

F.H. Mtulya, J.:

A question was raised for determination in the present case as to whether a limited liability company has marital status that it can be capable to marry or have a spouse hence spouse consent is necessary in mortgaging real property land. The question arose from the fact that a response on the subject settles down a real dispute between *Maryam Nassor* (the plaintiff) and *Abla Estates Developers & Agency Limited, Nassor Khalifa, Ahmed Nassor Khalifa & KCB Bank* (the defendants) on a complaint registered in this case concerning spouse consent.

For purposes of clarity and easy appreciation of the dispute between the parties, I will explain, albeit in brief, the history available

on record which justifies the above cited question framed by the parties after full hearing of the case and registration of all facts and evidences.

A wedding ceremony was held on 18th May 1978 to celebrate a marriage contract between the plaintiff and Mr. Nassor Khalifa (the first defendant). Since then, 1978, to the filing of the present suit on 24th August 2020, the dual were living in good terms and harmony and God blessed them with a total of eight (8) children of equal numbers in boys and girls, including Mr. Ahmed Nassor Khalifa, the first born of the family (the third defendant).

The family life started in a rented house located at Songea Street within Ilala District of Dar Es Salaam City. Sometimes between 1978 and 1992, the dual shifted their residence to Shaurimoyo area within Lindi Street of Ilala District and later Mikocheni area within Kinondoni District in Dar Es Salaam City. In their matrimonial life, the plaintiff and the second defendant acquired several properties, including houses erected in: **Plot No. 489 Mikocheni Phase II area within Kinondoni District, Dar Es Salaam** (the land); two (2) houses located within Ilala District in Dar Es Salaam; a house at *Kwa Nyerere* area within Kinondoni District in Dar Es Salaam; a house at Victoria area within Kinondoni District in Dar Es Salaam and spare parts shop called

Muscat located at Shaurimoyo area within Ilala District in Dar Es Salaam.

During acquisition of the properties, the record shows that the second defendant had entered into other marriage contracts with two (2) other wives in different occasions before 2010 and all three (3) wives were living in different houses erected by the second defendant. However, on the 31st day of March 2010, the second defendant changed the use and status of the land from a dwelling house of Nassor Khalifa Group A Class (a) (c) to residential building Group B Class (d) of **M/s Abla Estate Developers & Agency Company Limited of P. O. Box 3810 Dar Es Salaam** (the first defendant), a limited liability company duly owned by the second and third defendants.

According to the **Town and Country Planning (Use Classes) Regulations, GN. No. 504 of 1960 (As Amended in 1993)** (the Regulations) made under section 78 of the **Town and Country Planning Act** [Cap. 355 R.E. 2002] (the Town Planning Act), the lands which are categorized in Group B Class (d) are not used for dwelling purposes. The Town Planning Act and Regulations are silent on lands in Group B Class (d) of matrimonial property and whether the change of categories, wife consent is necessary.

In the instant case, the exercise of change of land group and class was completed without consultations of the three (3) wives suitably wedded by the second defendant. The record in this case shows further that no any of the wives complained or filed a dispute of the changes of title and status of the land. Following the changes of the title, use and status of the land, on 27th September 2010, the first defendant applied for banking loan facility and was granted by **KCB Bank Tanzania Limited** (the fourth defendant) after signing a mortgage of right of occupancy between the first and fourth defendants on 29th November 2010 secured by the land.

The loan facility was named: *a term loan facility in total amount of United States Dollar One Million Three Hundred Eighty Thousands Only (1,380,000 USD) aimed at developing ultra-modern shops and office block on the land* (the loan facility). The loan facility was not fully paid by the company, the first defendant, as per conditions agreed in mortgage deed hence the fourth defendant wanted to enjoy her rights written in the deed, including selling of the collateral, the land, hence the first defendant preferred **Misc. Land Application No. 604 of 2018** (the application) and **Land Case No. 264 of 2018** (the case) in this court to restrain the fourth defendant from exercising her right under the mortgage deed, selling the land.

However, the application was dismissed for want of three (3) conditions to persuade this court in granting temporary injunction whereas the case was marked settled out of the court in favour of payment of outstanding sum of the money duly unpaid in loan facility from the first to the fourth defendant. The decision of this court in the case was delivered on 5th June 2018 and the record in the present case is silent on payments of the outstanding sum or part of the same up to the filing of the present suit on 24th August 2020 by the plaintiff. The record is also silent on the status of claims of the other remaining two (2) wives of the second defendant in the dispute.

The main complaints of the plaintiff, which were fine-tuned by learned minds in Mr. Adrian Mhina for the plaintiff, Mr. Elly Musyangi for the first, second and third defendants and Mr. Fredrick Massawe, for the fourth defendant, on 21st September 2021, during framing of the issues were, namely:

> *Whether there is a spouse consent from the plaintiff during creation of mortgage of the suit property; whether the first defendant loan from the fourth defendant was lawfully obtained; and what reliefs are the parties entitled to.*

However, during the hearing of the case and final submissions of the parties, the first issue did not detain this court's precious time

as it was quickly resolved and settled by the parties themselves by use of facts and evidences registered by all four witnesses who were brought to testify in the present case, and in brief, it was answered in affirmative.

The parties specifically agreed that the plaintiff is a wife of the second defendant and that the second defendant had transferred the land on 31st March 2010 from his name to the first defendant's name and proceeded to mortgage the land to the fourth defendant without the consent of the plaintiff. However, the parties are at horns contesting the legality of the mortgage between the first and fourth defendants and registered the second issue which reads: *whether the first defendant loan from the fourth defendant was lawfully obtained.* In order to appreciate the contest, I will briefly display the facts and evidences registered by the parties.

The plaintiff on her part testified that she was married to the second defendant on 18th May 1978 and tendered a *Certificate of Marriage No. A.00012405* dated 20th May 1978 which shows that the dual had a marriage contract at *Ibaadh Mosque* within Ilala in Dar Es Salaam. The certificate was admitted as an exhibit P.1 in this case. According to the plaintiff, after their marriage ceremony the dual lived in a rented house at Songea and Lindi Streets of Ilala before buying

two houses in Ilala and the land in 1992. In her testimony, the plaintiff claimed that she is currently living with her family in a dwelling house of matrimonial home built at the back of the commercial complex (Abla Complex) which is also raised on the same land.

The plaintiff testified further that she protested the construction of Abla Complex and that she was not consulted during the transfer and change of land use from the second to the first defendant & she did not consent the mortgage of the land between the first and fourth defendant.

However, the plaintiff stated that: it is the Arabs culture and tradition which does not allow husbands to consult their wives; she does not know where the money for construction of the Abla Complex came from; she did not contribute anything towards acquisition of the land and construction of Abla Complex; she heard news that the land was under mortgage long time ago; she stated that the Ilala house was bought as a matrimonial home, but was sold by the second defendant without consent of the plaintiff without any complaint; that she was not aware of the change of name and use of the land which was initiated by the second defendant and mortgaged by the second and third defendants in the name of a limited liability company; that

she is aware that Abla Complex was subject of several attempts of sale, but she did not take any steps to intervene the exercises; she is currently complaining because the fourth defendant wants to auction the land and its attached Abla Complex & the matrimonial house; and that the second and first defendants are her husbands and cannot be separated as two distinct persons.

The plaintiff also invited Mr. Said Mfaume Mbarala (PW2), Marketing Manager of the first defendant, to corroborate her statement of the existence of two buildings constructed on the land, namely: the alleged matrimonial home and Abla Complex. According to PW2 Abla Complex was built on the land when the matrimonial house of the second defendant was already erected in the land and the plaintiff is still living in the house. In his testimony, PW2 stated that when construction of Abla Complex on the land was taking place, the plaintiff was present and witnessed the construction. Finally, PW2 testified that he saw posts of the sale notices of the fourth defendant posted in Abla Complex twice in different intervals and had informed plaintiff of the same.

However, PW2 stated that he is not in managerial position to know details of the plot number where Abla Complex was built or loan agreement entered between the first and fourth defendants; he

cannot state how the land was acquired; he cannot state when the plaintiff and the second defendant entered into marriage contract; and cannot state any reason why the plaintiff declined to invite any of her eight (8) children to testify for her in this dispute.

The defence on its side had brought in this case two witnesses, Mr. Damas Gabriel Mwaganje (DW1), Litigation Manager of the fourth defendant and Mr. Ahmed Nassor Khalifa (the third defendant) who also appeared for the first and second defendants. In his brief testimony, DW1 stated that the second and third defendants are directors of the first defendant and had bank-customer relation with the fourth defendant in the mortgage deed as the first defendant borrowed the loan facility from the fourth defendant. According to DW1, the loan facility was secured by the land in title deed which was transferred from Estomin Stephen Kileo of P. O. Box 5284 Dar Es Salaam to the second defendant on 19th February 1992 at the consideration of Tanzanian Shilling Two Million Only (2,000,000/=), and on 31st March 2010 the title deed was transferred to the first defendant from the second defendant.

In his testimony, DW1 stated that the fourth defendant followed all legal procedures in granting the loan facility, including due diligence which shows that the title deed is in the name of a limited

liability company which cannot marry a wife or have a spouse. In his opinion, DW1 stated that to search for wives consent in legal entities is not part of due diligence in the checklist of banks which offer loan facilities to their customers.

According to DW1, it was the second defendant who changed the title status to move the land from dwelling house to the limited liability company and applied for the loan facility, which was granted by the fourth defendant hence the plaintiff cannot come and claim the land is a matrimonial property. In finalizing his testimony, DW1 stated that the plaintiff has not registered any complaint with regard to the changes of the status and use of the land in the fourth defendant's office as per Bank of Tanzania Consumer Protection Regulations or police station to show vigilance on her protest or show any interest in the limited liability company of the first defendant or protested the previous notices issued by the fourth defendant which intended to sale the security land. With regard to payment of loan facility, DW1 stated that the first defendant has not fully discharged his liability as per deed agreement hence the fourth defendant moved in to exercise her rights as per mortgage deed.

In support of his testimony, DW1 tendered in this case mortgage of a right of occupancy in Certificate of Title No. 30063 Plot No. 489,

Land Office No. 75309 located at Mikocheni Phase II Area in Dar Es Salaam between M/S Abla Estate Developers & Agency Company Limited and KCB Bank Tanzania Limited signed on 29th November 2010 (exhibit D.1); and exhibit D.2 collectively which contained: Certificate of Occupancy of Estomin Stephen Kileo of P. Box 5284, Number 30063, Plot No. 489, Land Office No. 75309 located at Mikocheni Phase II Area in Dar Es Salaam issued on 31st August 1984 which was transferred to the second defendant on 19th February 1992; Two (2) Approval of Variation of Conditions of Right of Occupancy dated 25th February 2009; Deed of Gift of Immovable Property between Nassoro Khalifa and Abla Estates Developers & Agency Company Limited signed on 29th January 2010; Transfer of Right of Occupancy from Nassoro Khalifa to Abla Estates Developers & Agency Company Limited signed on 29th January 2010 and Certificate of Approval dated 22nd February 2010.

In order to establish there was a previous case and an application in 2018 concerning the present case, DW1 also tendered exhibit D.3 in this case which contained: ruling of the case, decree which emanated from the case and drawn order of the application. However, DW1 stated that spelling errors in the mortgage deed and absence of names of learned counsel in attestation part found in Land Form No. 35 & Deed of Gift of Immovable Property (Deed of Gift) are

minor issues which do not remove the second defendant's position from directorship of the first defendant.

On his part, DW2 testified that the first defendant borrowed money from the fourth defendant in 2010 and secured the loan facility by use of the land without consultation of the plaintiff hence the plaintiff wants her portion of the land back for dwelling house. However, DW2 stated that: in Arabs culture and traditions, wives are not consulted in various decision-making emanating from their husbands; when the loan facility was applied by the first defendant and granted by the fourth defendant, the land had no any encumbrances; the first defendant is a legal entity with its own directors who can decided their own affairs without consultation of their wives; and the case filed in this court in 2018 was marked settled in favour of deed of settlement between the first and fourth defendants.

In brief, this court is asked to determine: *whether the first defendant loan from the fourth defendant was lawfully obtained.* Before this court delivered its reply to this issue, learned counsels of both parties were granted leave to interpret the facts and evidences registered in this court in final submissions. However, learned counsel

for the first, second and third defendants, Mr. Musyangi declined to register his final submission.

According to Mr. Mhina, learned counsel for the plaintiff, in order to determine the second issue properly, this court has to search for initial transfer of the land from the second to the first defendant as the principle in law require those who have legal title to pass to other persons. In his interpretation, Mr. Mhina thinks that the issue of lawfulness of the loan facility is to be determined by looking at the principle of legal owner of the land. In his opinion, the second defendant had no legal title to pass to the first defendant as there was no wife consent hence the mortgage between the first and fourth defendant is illegal and cannot stand in law.

In order to bolster his argument on consent of wives in mortgage agreements, Mr. Mhina cited the provision in section 59 (1) of the **Law of Marriage Act** [Cap. 29 R.E. 2019] (the Law of Marriage Act) which provide that where estates or interest in matrimonial home is owned by the husband and wife, it cannot be alienated without consent of the other spouse. With regard to Deed of Gift and transfer of the land from the second to the first defendant, Mr. Mhina cited the provision in section 161 of the **Land Act** [Cap. 133 R.E. 2019] (the Land Act) and precedent in **Farah Mohamed v. Fatuma Abdallah**

[1992] TLR 205, which held that: *he who has no legal title to the land, cannot pass good title over the same to another.*

On his part, Mr. Elisa Abel Msuya, thinks that there are two matters to be determined to assist this court in arriving at the determination of the second issue: *whether the first defendant loan from the fourth defendant was lawfully obtained.* In his opinion, Mr. Msuya thinks that the validity of the loan facility is to be arrive through two routes, namely: first, *whether the suit property is a matrimonial home and therefore a spouse consent was required to be obtained before the first defendant secured the loan facility from the fourth defendant*; and second, *whether the plaintiff had a duty to register her interest on the land by filing a caveat.*

In his opinion, Mr. Msuya thinks that the plaintiff failed to discharge her duties to prove the land is matrimonial home as per requirement of the law in sections 110 (1) & (2), 111 and 115 of the **Evidence Act** [Cap. 6. R.E. 2019] (the Evidence Act) and precedent in **Paulin Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 where at page 15 it was stated that: *it is trite law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharge his and that the burden of proof is not diluted on account of the weakness of the opposite party's case.*

According to Mr. Msuya, the plaintiff failed to substantiate the land is a matrimonial property and belongs to the second defendant to align with the requirement of the law in sections 113 (1) and 114 (1) (a) & (b) of the Land Act which require spouse consent in mortgaging matrimonial properties. According to Mr. Msuya, the land belonged to the first defendant, a limited liability company, which is capable of entering into any contract with capacity to sue or being sued. In support of his submission, Mr. Msuya cited provision of section 15 of the **Companies Act** [Cap. 2002 R.E. 2002] (the Companies Act) and a 19th Century celebrated English case of **Solomon v. Solomon & Co. Ltd** [1897] AC 22.

On second raised issue, Mr. Msuya replied briefly that the plaintiff had not filed any caveat for protection of her interest on the land as per requirement of the law in sections 59 (1) & (2) of the Law of Marriage Act. In order to substantiate his argument, Mr. Msuya cited the precedents in **Hadija Issa Arerary v. Tanzania Postal Bank**, Civil Appeal No. 135 of 2017 and **Idda Mwakalindile v. NBC Holdings Corporate**, Civil Appeal No. 59 of 2000 arguing that the plaintiff was duty bound to register her interest on the land by filing caveat before rushing to this court alleging lack of spouse consent in the mortgage deed.

I understand Mr. Mhina at page 3 of his final submission stated, with citation of authorities, that the second defendant cannot pass title deed to the first defendant as he had no legal title. It is fortunate that the same issue is found at the fourth defendant's version at the same page 3 of Mr. Msuya's submission. According to Mr. Msuya, the land was solely acquired by the second defendant, changed status by Deed of Gift of the second defendant, used as collateral for loan facility by the second defendant as a legal entity and the loan facility was not paid hence the fourth defendant wanted to exercise her right under the mortgage deed.

I am aware of the real dispute which brought the parties in this case was whether a limited liability company has marital status that it can be capable to marry or have a spouse hence spouse consent is necessary in mortgaging real property land of matrimonial property. However, from the registered materials in the present case, the law is certain and settled that a company is a separate legal entity distinct from its members (see: section 15 of the Companies Act, **Fah Construction Company Limited v. Atlas Mark Group (T) Limited & Two Others,** Misc. Commercial Application No. 154 of 2020; **Luwaita Amcos Limited v. Tanzania Coffee Board & Another**, Civil Case No. 11 of 2019; **M/S Kanyarwe Building Contractor v. The Attorney**

General & Another [1985] TLR 161 and **Solomon v. Solomon & Co. Ltd** (supra).

This court in the precedent of **Fah Construction Company Limited v. Atlas Mark Group (T) Limited & Two Others** (supra), at page 8 of the decision, stated that:

> *The principle of corporate personality, in the classic case of **Solomon v. Solomon & Co. Ltd [1897] AC 22**, [is to the effect that] a registered company is a legal person separate from its members. It can be held liable in its capacity as a juristic person.*

Prior to the decision of this court in **Fah Construction Company Limited v. Atlas Mark Group (T) Limited & Two Others** (supra), our superior court had already imported the precedent of the House of Lord in **Solomon v. Solomon & Co. Ltd** (supra) into our jurisdiction in 2002 in the precedent of **Yusuf Manji v. Edward Masanja & Another**, Civil Appeal No. 78 of 2002, and their Lordships are quoted to have said that:

> *...this principle, it is to be observed, was enunciated in the case of **Solomon v. Solomon & Co. Ltd** (1897) AC 22, that a company is a legal person, its members are not liable for its activities.*

In the precedent of **Solomon v. Solomon & Co. Ltd** (supra), Lord MacNaughten of the House of the Lord in 1897, stated the most celebrated quote in company law in the following words:

> *The company is at law a different person altogether from subscribers...and...though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive profit, the company is not in law the agent of subscribers or trustee of them. Nor are subscribers, as members liable, in any shape or form, except to the extent and in the manner provided in the Act.*

I understand there are exceptions, considering the fact that a company does its activities through human agents and veil may be lifted to identify the human person when there is fraud or special circumstances. I do not see any fraud or exceptional circumstances in the present case to hold that the second respondent as a director of the first defendant acted under fraud to deprive his three (3) wives the right to own the land.

The facts and evidences registered in the present case show that it was the second defendant who moved and bought the land from

Estomin Stephen Kileo of Dar Es Salaam on 19th February 1992 and transferred it, by use of Deed of Gift, to the first defendant on 31st March 2010 and the first defendant used it as collateral to secure loan facility from the fourth defendant. The facts and evidences presented in this case show that no any of the wives of the second defendant who preferred caveat between 19th February 1992 and 31st March 2010 as per requirement of the law in section between 59 (1) & (2) of the Law of Marriage Act or registered any complaints of fraud in civil or criminal court since the initial transfer of the land from the second to first defendant and during the loan facility in 2010.

In my opinion, I think, the requirement of spouse consent in mortgage deed cannot be asked in a situation where the applicant applied, granted and enjoyed the loan facility, and like in the present case, after default of payment of loan facility, the first defendant preferred the case which was settled by the parties. After the settlement of the case, several notices of the case were displayed for sale of the land. The plaintiff was well aware of the situation, but declined to register any complaint before the fourth defendant as per Bank of Tanzania Consumer Protection Regulations or any nearby police station to show vigilance on her protest or at least file a civil cause to defend her interest, if any (see: **Melchiades John Mwenda**

v. Gizelle Mbaga (*Administratix of the estates of John Japhet Mbaga-deceased*) **& Two Others**, Civil Appeal No. 57 of 2018)

Even if we assume the company in its name or through its director can marry and therefore due diligence ought to be taken by financial institutions which lend money to their customers, that move will not be supported by any current practice of this court or Court of Appeal. Similarly, the argument of tracing the transfer of the land or signing of the Deed of Gift to transfer the right of occupancy on 29th January 2010 or 31st March 2010 when the land was changed its status, has no any merit.

The current test of the Court of Appeal is whether the financial institution can detect interest of spouses in a right of occupancy. It was stated in the precedent of **Idda Mwakalindile v. NBC Holdings Corporate** (supra) when determining section 59 (2) of the Law of Marriage Act and section 161 of the Land Act that:

> *Under the Law of Marriage Act, a spouse had a registrable interest in the matrimonial home. In this instance, the Appellant had not registered her interest. There was therefore no way the First Respondent could have known of her interest* ***considering that the house was in the sole name of her husband***.

(Emphasis supplied).

This reasoning was well received by the same court a decade later in the precedent of **Hadija Issa Arerary v. Tanzania Postal Bank** (supra). In this decision, the Court of Appeal perused the provisions enacted in section 59 (2) of the Law of Marriage Act, section 114 & 161 (1) of the Land Act, section 8 (3) of the Mortgage Financing (Special Provision) Act, No. 17 of 2008 (the Mortgage Financing Act) and precedent in **Idda Mwakalindile v. NBC Holdings Corporate** (supra), and the Court declined to decide in favour of a spouse and reasoned that:

> *Since it was sufficiently proved that...there was no any caveat whatsoever registered, then the appellant cannot benefit from the provisions of section 59 (2) of LMA and section 161 of the Land Act on account of the fact that she did not have a registrable interest in the mortgaged property... we are increasingly of the view that the mortgagee was correct to disburse the loan* ***believing that there was no any other third party with interest on the mortgaged property hence the mortgage was valid.***

(Emphasis supplied).

In the present case, the plaintiff cannot benefit either from the provisions of section 59 (2) of the Law of Marriage Act or section 161 (2) of the Land Act on account that she did not register caveat which would have assisted the fourth defendant to detect existence of interest of the third party, plaintiff. In any case the fourth defendant believed that there was no any third party with interest on the mortgaged property of the company, the first defendant. I have therefore decided to hold the second issue in this case in affirmative. *The first defendant loan from the fourth defendant was lawfully obtained.*

I am aware that Mr. Msuya in his final submission complained of legal propriety of the present suit resisting the jurisdiction of this court being barred by the doctrine of *functus officio* as this dispute was already determined in this court in **Land Case No. 264 of 2017**. To bolster his submission on the doctrine, Mr. Msuya cited the precedent in **Tanzania Telecommunication Co. Limited & Three Others v. Tri-Telecommunication Tanzania Limited**, Civil Revision No. 62 and 2006 and that the remedy which the plaintiff has is application for revision as per directives of the Court of Appeal in the precedent of **Halais Pro Chemie v. Wella A. G.** [1996] TLR 269.

However, Mr. Msuya pretends to forget the decision of this court delivered on 28th May 2021 on his preliminary objection. In the decision the same point was raised and the precedent in **Tanzania Telecommunication Co. Limited & Three Others v. Tri-Telecommunication Tanzania Limited** (supra) was cited, but this court overruled the objection for want of conditions in preliminary objection as pronounced in the famous case of **Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd** (1969) EA 696. This court cannot be detained again to resolve the same matter.

Similarly, Mr. Mhina and Mr. Musyangi during the hearing of this case were complaining on spelling errors in various documents which were tendered in this court. This court has said, in a number of times, that minor issues which do not go into the merit of the matter, cannot be entertained by this court. Issues of absence of alphabet 's' in the first defendant name in exhibit D.1 or the name Grace G. Malekano, learned counsel, in Land Form No. 35 in attestation lines of exhibit D.2 collectively cannot detain this court, especially after insertion of section 3A & 3B in the **Civil Procedure Code** [Cap. 33 R.E. 2019] (the Code) in favour of the overriding objective.

The principle has already received judicial practice in our superior court and it is generally acceptable that parties or learned counsels in disputes brought before our courts to focus on substantive justice (see: **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017, **Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017, **Mandorosi Village Council & Others v. Tuzama Breweries Limited & Others**, Civil Appeal No. 66 of 2017 and **Njoka Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017).

The complaints on the alphabet 's' and the name the learned counsel were not detected or protested during the application, grant and enjoyment of the loan facility, but raised during the hearing of this case as an escape route to deprive the fourth defendant's right to enjoy the security as per provisions in the mortgage deed. The practice of our superior court shows that such averments may be ignored (see: **Melchiades John Mwenda v. Gizelle Mbaga** (*Administratix of the estates of John Japhet Mbaga- deceased*) **& Two Others** (supra). On my part, I have decided to ignore such averments in the instant case. I consider them as afterthought.

This court has said in a bundle of precedents that this court is not a bush were defaulters in lending institutions will hide to escape

their responsibilities (see: **SME Impact Fund CV & Two Others v, AgroServe Company Limited**, Civil Appeal No. 9 of 2018, **F.B.M.E Bank v. John Kengele & Two Other**, Commercial Revision Case, No. 1 of 2008, and **Sudi Abdi Athumani v. National MicroFinance Bank PLC Bukoba Branch**, Land Case Appeal No. 47 of 2018).

In the precedent of **Sudi Abdi Athumani v. National MicroFinance Bank PLC Bukoba Branch** (supra), this court after considering the reasons of insertion of section 3A & 3B in Code and directives of this court in the precedent in **F.B.M.E Bank v. John Kengele & Two Other** (supra), it stated, at page 10 of the judgment that:

> *Financial institutions must be protected, not only because they offer loans, but it is because the monies in financial institutions belong to the people of this country, not the financial institutions. Those who prefer loans and try to use courts of law to delay or obstruct payment of the loan affect not only the financial institutions community, but also our populations at large.*

In my opinion, I think, this decision will follow the same course to avoid uncertainty of the precedents derived from this court. I understand there is decree of this court which emanated from the

consent decision delivered on 13th April 2018. It is uncertain on its execution status. It is also uncertain as to who will come next on the same subject matter. In order to avoid uncertainty of the future events in litigation of similar matter, this courts orders the fourth defendant to enjoy her rights as per conditions in exhibit D.1 admitted in this case.

This case is one of the exceptional cases which produced three (3) sub issues to be resolved first before meeting the main issue drafted at second part of the issues, namely: *whether the first defendant loan from the fourth defendant was lawfully obtained.* The three (3) minor issues were: first, *whether there was spouse consent sought in the initial transfer of the land from the second to the first defendant*; second, *whether the suit property is a matrimonial home and therefore a spouse consent was required to be obtained before the first defendant secured the loan facility from the fourth defendant*; and third, *whether the plaintiff had a duty to register her interest on the land by filing a caveat.*

It is fortunate that the materials to reply all three (3) issues were registered in the case during the hearing of the matter and were well interpreted by learned counsels Mr. Mhina and Mr. Msuya during the final submissions, which were left for court's determination and were

accordingly determined. This is to say the three (3) minor issues were raised in-route towards determination of the main issue. I am aware of the general rule regulating pleadings and raising of issues as interpreted in the precedents in **Barclays Bank (T) Ltd v. Jacob Muro**, Civil Appeal No. 357 of 2019 and **Samwel Kimaro v. Hidaya Didas**, Civil Appeal No. 271 of 2018. However, the gist of the rule is based on the right to be heard and rule against surprise to the opposite party.

In the present case, the parties have registered facts and evidences during the hearing of the case which were fine-tuned by learned counsels of the parties to produce three (3) minor issues which needed determination first before moving to the determination of the main issue. In short, they were neither surprised nor curtailed their right to be heard as per article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R. E. 2002] (the Constitution) and precedents in **Judge In Charge, High Court at Arusha & The Attorney General v. Nin Munuo Ng'uni** [2004] TLR 44; **Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma**, Civil Appeal No. 45 of 2002; **Tanelec Limited v. The Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 20 of 2018; and **Ponsian Kadangu v. Muganyizi Samwel**, Misc. Land Case Appeal No. 41 of 2018.

In any case, there is an enactment of **Oder XIV Rule 5 (1) & (2)** in the Code supported by the precedents of the Court of Appeal in **James Funke Ngwagilo v. The Attorney General** [2004] TLR 161; **Blay v. Pollard & Moris** (1939) 1 KB 628; and **Gandy v. Caspar Air Charters Ltd** (1956) 23 EACA 139, which allow this court to decide on facts and evidences placed before its table and by the very nature of the facts and evidences require decision of this court to be delivered.

Before I pen down, I must state that, this court is allowed by the law and practice of its court and Court of Appeal to give orders and/advice to the parties and justice stakeholders (see: **The Hon. Attorney General v. Reverend Christopher Mtikila**, Civil Appeal No. 45 of 2009; **Amin Abdulnuur & Two Others v. Muleba District Council**, Land Case No. 17 of 2016; and **Martha John Mushi** (*as an administratix of the estates of the late John Stephen Mushi*) v. **Ruth Isack Mjema & Two Others**, Land Case No. 136 of 2019). I may wish to offer an advice in this case.

The parties in the present case, and any other parties in other cases related to loan facilities who lend monies from banks, financial institutions or any other lending institutions, should not close their eyes and use this court or any other court to delay or protest loan

repayment schedules. Failure to that this court will not subscribe itself to be a shield or grave digger of the lending institutions in this State.

As I have initially said in this judgment that the monies in financial institutions belong to the people of this country and other communities, not the financial institutions as such. This court will not turn our financial institutions into grave yards. In dispensing justice, this court is rendering valuable services to the society at large and to the consumers of our justice system in particular. If so, the society or consumers must continue to have trust and faith in our judicial system. That is the mission of this court and part of the Third Pillar in Judiciary Five-Years Strategic Plan 2020/21 - 2025/26 (the plan).

The trust and faith of the parties in cases and justice stakeholders towards this court were well interpreted even before enactment of the plan (see: **VIP Engineer and Marketing Ltd. v. Said Salim Bakhresa**, Civil Applicant No. 47 of 1996 and **Samwel Kimaro v. Hidaya Didas**, Civil Application No. 20 of 2012). In short, there would be a danger of consumers of justice losing confidence in our courts if judges or magistrates are interpreting laws to aid defaulters of the loan repayment schedules.

Having said so, and considering the evidences produced in this case, I find no any merit whatsoever in the plaintiff's case. The plaintiff

has failed to produce relevant materials on balance of probabilities to persuade this court to decide in her favour as per requirement of the law in section 3 (2) (b), 110 (1) & (2), 112 and 115 of the Evidence Act and precedents in **Attorney General & Others v. Eligi Edward Massawe & Others**, Civil Appeal No. 86 of 2002; **Anthony M. Masanga v. Penina (Mama Mgesi)**, Civil Appeal No. 118 of 2014; **Samson Ndawanya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017; and **Paulin Samson Ndawavya v. Theresia Thomasi Madaha** (supra). I have therefore decided to dismiss this case with usual consequences of costs awarded to the defendants.

Right of Appeal explained.

Ordered accordingly.

F. H. Mtulya

Judge

09.11.2021

This Judgment is delivered in Chambers under the seal of this court in the presence of Mr. Stephen Mhina for the Plaintiff, and in the presence of learned counsels, Mr. Elisa Abel Msuya and Irene Mchau for the fourth defendant.

F. H. Mtulya

Judge

09.11.2021