

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL NO. 186 OF 2020

*(Originating from the Judgment of Kinondoni District Land and Housing
Tribunal in Land Application No. 389 of 2012)*

INTERNATIONAL COMMERCIAL BANK LIMITED APPELLANT

VERSUS

MARRY ANNA LYIMO 1ST RESPONDENT

AMADEUS G. MOSHA 2ND RESPONDENT

JUDGMENT

Date of the last Order 29.10.2021

Date of Judgment: 03.11.2021

A.Z. MGEYEKWA, J

This is a first appeal, it stems from the decision of the District Land and Housing Tribunal for Kinondoni in Land Appeal No. 389 of 2012. The material background facts to the dispute are briefly as follows, Marry Anna Lyimo, the 1st respondent instituted a case at the tribunal suing Amadeus

Mosha, Luquiman Kamini Mbululo, and International Commercial Bank Ltd for unlawfully mortgaging the matrimonial property premises situated on Plot No. 274 and 276 Block 'A' Kimara Temboni without seeking the consent of the spouse. The material background facts to the dispute are briefly as follows; the 1st respondent averred that she had been married to the 1st respondent. The 2nd respondent guaranteed the Liquman Kamini Mbululo to secure a loan from the International Commercial Bank Ltd. Subsequently, Liquman Kamini Mbululo defaulted in repayment of the loan, and steps were made to regularize the loan.

The Bank decided to enforce the payment of the loan agreement. The 1st respondent at the District Land and Housing Tribunal testified to the effect that she did not give her consent as a spouse for the acquisition of the said loan which consent is mandatory to protect her overriding interest in the property as a spouse. She was shocked to see an advertisement notice advertising their homeland for sale. The District Land and Housing Tribunal determined the matter and decided in the favour of the 1st respondent.

The District Land and Housing Tribunal decision did not amuse the appellant. He decided to challenge it by way of appeal before this court on two grounds of grievance, namely:-

- 1. That the trial Chairman erred in law and facts by holding that the 1st Respondent was a lawful wife of the 2nd Respondent.*
- 2. That the Tribunal erred in law in shifting the burden of proof and in holding that the Appellant failed to seek consent from the spouse.*
- 3. That the Tribunal failed to evaluate the evidence on record, thereby reaching an erroneous decision.*

When the matter came before this court for a hearing, the Court acceded to the parties' proposal to have the matter disposed of by way of written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to.

In his submission, the learned counsel for the appellant started with a brief background of the facts which led to the instant appeal which I am not going to reproduce in this appeal.

In his submission on the first ground, he was brief and focused. The appellant's counsel contended that the trial Chairman erred in law and facts in holding that the 1st Respondent was a lawful wife of the 2nd Respondent. The learned counsel for the appellant claimed that on the record there was a difference in the description of the 1st Respondent as she described herself as Marry Anna Lyimo while in the Certificate of Marriage (Exh. P1) she was described as "Marry Anna Lyimo" without evidence to link between the two

names as of the one person. He went on to submit that at the Tribunal, the 2nd Respondent who is alleged to be the husband of the 1st Respondent had different names. Supporting his submission he referred this court to the Certificate of Marriage which shows that the 1st Respondent was married to Amadeus Ngimonyi and not Amadeus G. Mosha who is the mortgagor. He further contended that in the said mortgage, the 2nd Respondent's wife who gave consent over the same was Bernadetha Paul Lyimo and not Marry Anna Lyimo.

The learned counsel for the appellant valiantly argued that the failure of the 1st Respondent to explain the discrepancies of her names and her husband makes the two names to refer to different persons. There was no proof over the same. He concluded by stating that the lawful wife of the 2nd Respondent is Bernadetha Paul Lyimo who consented to the said mortgage. Marry Anna Lyimo was married to Amadeus Ngimonyi and not Amadeus G. Mosha the fact which the 1st Respondent failed to prove. He questioned the *locus standi* of the 1st Respondent if she truly has interest or *locus standi* in the disputed matrimonial property. To fortify his submission he referred this court to the cases of **Mary Lupatu v Magdalen Kulwa Itumbagija**, PC. Civil Appeal No. 42 of 2019, HC at Dar es Salaam (unreported), **Saranga Wambura Nungu v Thomas Kisheri (Administrator of the Estate of the**

Kisheri Nyango), Misc. Civil Application No. 170 of 2019, HC at Mwanza (unreported).

Submitting on the second ground, the learned counsel for the appellant was brief and focused. He contended that the trial Chairman erred in law in shifting the burden of proof and holding that the appellant failed to seek consent from the spouse while on record the 2nd Respondent's wife, Bernadetha Paul Lyimo consented over the same. The learned counsel strongly submitted that there was no need of shifting a burden of proof to the appellant while the lawful wife of the 2nd respondent Bernadetha Paul Lyimo was introduced and verified by the appellant.

It was his further submission that in shifting the burden to the appellant in bringing Bernadetha Paul Lyimo it was an error in reaching the said decision since the said Bernadetha Paul Lyimo was introduced to the appellant by the 2nd respondent. He added that the appellant verified all the requisite from her. He valiantly contended that the 2nd respondent was in a good position to call her during the trial and not the appellant as held by the trial Chairman. To bolster his position he referred this court to the case of **Reference Point Limited v Overseas Infrastructure Alliance (1) P. Ltd**, Civil Case No. 71 of 2018, HC at Dar es Salaam (unreported).

The learned counsel urged for this court to declare the transaction leading to the mortgage was null and void ab initio for want of spouse consent.

With respect to the third ground, the learned counsel for the appellant submitted that the tribunal failed to evaluate the evidence on record, thereby reaching an erroneous decision as the 1st Respondent Marry Anna Lyimo suing as the wife of Amadeus G. Mosha herein 2nd Respondent, had no locus standi in filing the Application as she is not the lawful wife of the 2nd Respondent.

Insisting, he argued that the Appellant argued that the 1st Respondent was not the wife of the guarantor since the guarantor brought his wife and endorsed the Mortgage deed and attached the spouse picture. The Appellant tendered the Consent Certificate and the same was admitted as exhibit DE2. My Lord, having regards to the facts however the Appellant argued the 1st respondent is not the legal wife as shown and proved from the Certificate of Marriage, surprisingly the trial Chairman did not consider the differences of names. Could the trial chairman had evaluated the evidence on record properly, he could have dismissed the Application as the Certificate of Marriage has a lot of contradictions. Marry Anna Lyimo is "Marry Anaa Lyimo" in the Certificate of Marriage and there was no any explanation over the same. Her husband in the said certificate is Amadeus Ngimonyi and not Amadeus G. Mosha. There was any explanation as to the said discrepancies

of names. Thus why we submit that the trial chairman failed to evaluate the evidence on record thereby reaching on an erroneous decision. He went on to submit that the law requires the evidence of both parties to be evaluated in dispute. Fortifying his position he cited the case of **D.B. Shapriya and Co. Ltd vs. Mek one General Trader and Another**, Civil Appeal No. 197 of 2016 HC (unreported). He valiantly contended that the trial Chairman erred in law and facts as in the Application the suit property was described as Plot No. 2782764, Block "A" Kimara Temboni while in the Judgment he described it as Plot No. 274 and 276. He added that with the Plot Number diversity, the differences lead us to observe and confirm that these are two different Plots that are not related in any way. Emphasizing his submission he cited the case of **Hasani Said Chonga v Yasini Mohamedi Mnengelea**, Labour Revision No. 05 of 2016 before Ngwembe, J was in his Judgment at page 6 reiterated the case of **Rajabu Dibagula v R** [2004] TLR. 196

It was his submission that every judgment should state facts of the case, analysis of those facts by reference to particular evidence adduced during the trial, and give sufficiently and the reasons which justify the findings of the Court. He referred this court to the Judgment by the District Land and Housing Tribunal and argued that it lacked all these requirements.

In the light of the above reasons, and based on the cited authorities the learned counsel for the appellant beckoned upon to allow the appeal and to quash the tribunal's Judgment and Decree with costs.

In his rebuttal submission, the respondents' Advocate confutation was strenuous. He came out forcefully and defended the tribunal's decision as sound and reasoned.

Before embarking to challenge the grounds of appeal, he raised a point of objection on exclusion and omission of one Luquiman Kamini Mbululo who was the 2nd respondent in the original decree of the Land and Housing Tribunal for Kinondoni. He contended that the judgment and decree of the tribunal bear four parties namely; Marry Anna Lyimo, the applicant; Amedeus G. Mosha (1st Respondent), Luquiman Kamini Mbululo (2nd Respondent), and International Commercial Bank, the 3rd Respondent. He went on to state that the omission of a necessary respondent at the stage of appeal renders the expected judgment after disposal of the appeal a nugatory and non-executable. Supporting his submission he cited Order XXXIX Rule 1 (1) of the Civil Procedure Code, Cap. 33 [RE.2019]. He cited the case of **Abudulatiff Mohamed Hamis v Mehboob Yusuf Osman & Another**, Civil Revision No. 6 of 2017 (unreported).

Submitting on the first ground, the learned counsel for the 1st respondent submitted that the difference between the name of the 1st respondent and

the one appearing in the marriage certificate is only bad handwriting. The names are seen as Mary Anaa Lyimo, but in a close glance, it is nothing other than Mary Anna Lyimo. He added that the 1st and 2nd respondents are legally married this was proven by the marriage certificate. He added that the only difference appears in the name of 2nd respondent used to guarantee the loan and the name which appears on the marriage certificate. It was his submission that the matter was addressed under oath before the District Land and Housing Tribunal. He insisted that the 1st and 2nd respondents are husband and wife residing on the matrimonial home situated on Plot No. 274 and 276/1 Block "A" Kimara Temboni.

The learned counsel for the 1st respondent went on to argue that the appellant is alleging that the wife of the 2nd respondent is Bernadetha Paulo Lyimo and not Mary Anna Lyimo without any evidence adduce on record. He valiantly argued that the appellant failed to summon the said Bernadetha Paulo Lyimo to testify before the tribunal. He urged this court to find that in every mortgage of the matrimonial property, there should be spouse consent, therefore, it was his view that it was the responsibility of the mortgagor to verify on the information whether the mortgagee has a spouse by making several follow-ups. Supporting his submission he referred this court to section 8 of the Mortgage financing (Special Provision) Act No. 17 of 2008 and section 59 (2) of the Law of Marriage Act, Cap. 29, [R.E 2019] which requires a spouse consent in mortgaging a matrimonial house. He also

cited sections 114 (1) (a) and (b) of the Land Act, Cap.113 [R.E 2019] which requires the consent of the spouse to make the mortgage valid.

Regarding the question of the burden of proof. He cited sections 110 and 111 of the Law of Evidence Act, Cap. 6 [R.E 2019 which provides that he who alleges must prove. He added that it was the appellant's responsibility to prove before the tribunal that Bernadetha Paulo Lyimo is the wife of the 2nd Respondent. He went to submit that it is the marriage certificate that proves that Marry Anna Lyimo is the wife of Amedeus G. Moshu, whose name, Amedeis Ngimonyi is used interchangeably to mean the same person. He added that an explanation of the names was given during trial at the tribunal. It is from the record that the 2nd respondent testified on the authenticity of the names. He went on to state that the law of marriage under section 59 (2) and section 114 (1) (a) and (b) protect the interests of a spouse in the matrimonial property. It was his view that the Tribunal was convinced with the evidence brought forward to prove marital status between the 1st and 2nd respondent.

The learned counsel for the 1st respondent did not end there he submitted that the description of the matrimonial property was earlier explained, to why there is a difference between Plot No. 2782764, Block "A" Kimara, Temboni, and Plot No. 274 and 276.

On the strength of the above, the learned counsel for the 1st respondent beckoned upon this court to find that the appeal has no merit and urged this court to sustain the decision of the Tribunal and dismiss the appeal with costs.

Opposing the appeal, the 2nd respondent contended that the evidence on record and the married certificate which was tendered and admitted by the District Land and Housing Tribunal as exhibit P1 proved a monogamous marriage between 1st respondent and the 2nd respondent and the two are living in one roof as a husband and a wife in the disputed property. He went on to submit that the requirement for spousal consent inland conveyance was provided for in section 59(1) of the Law of Marriage Act and a matrimonial home means the building or part of a building in which the husband and wife ordinarily reside together. To buttress his submission he also cited section 114 (2) of the Land Act, Cap. 113 which was amended by the Mortgage Financing (Special Provisions) Act, 2008. He further submitted that the requirement of the law not only does it requires the mortgagee to take reasonable steps to verify whether the applicant has a spouse.

It was his submission that this duty was not exercised by the mortgagee and the guarantor or 2nd respondent never identified any spouse to the appellant either by affidavit or being included in the spouse consent. He claimed that he was only required to execute the mortgage deed without

seeking his spouse consent with no written document or affidavit by the guarantor declaring that there were no spouse or any other third party holding interest in the mortgaged land and that the given spouse consent by Bernadeta Paul Lyimo is unknown to him.

The 2nd respondent went on to submit that the spouse consent adduced by the appellant could be made by anyone and anywhere just to prove spouse consent, for a spouse consent to be valid no any evidence was adduced to introduce the said spouse by the guarantor hence mark the consent invalid and unacceptable by the tribunal.

Submitting on the second ground of appeal, he referred this court to section 111 of the Evidence Act, Cap. 6 which stated that; "One who alleges must prove". To support his stand he cited the cases of **Abdulkarim Haji v Raymond Nchimbi Alois & Another** [2006] TLR 419, **Kwiga Masa vs. Samwel Mtubatwa** [1998] TLR 103 and added that the judgment should then be in line with Order XX Rule 4 & Order XXIX Rule 31 & 2 of Cap. 33. The 2nd respondent went on to submit that the law requires a person who is alleging some existing facts to prove the same. It was his view that the 1st respondent proved her case at the District Land and Housing Tribunal and the Chairman's dispassionate evaluation made its findings on the balance of probabilities.

The 2nd respondent stated that the Judgment and the decree by the District Land and Housing tribunal based on the parties own pleading this was well elaborated on the third page of the said judgment where the appellant themselves admitted that it was not the first respondent who gave the said consent and that the applicant was in no position bringing the person who consented to a mortgage unlikely to the first and the third respondent who failed to prove was the second respondent spouse.

The 2nd respondent continued to submit that the fact that the names of the 2nd respondent differ from the names in the marriage certificate is immaterial since it was well elaborated and corrected under oath before the tribunal. He added that the respondents are still residing in their matrimonial home. He went on to state that the names of the 2nd respondent in the marriage certificate read by his given name Amedeus Ngimonyi while his family name read Gaspar Ndelamio which meanwhile the signature by the second respondent are the same as the marriage certificate and the guaranteed document.

The 2nd respondent went on to submit that the appellant failed to include the mortgagor who was guaranteed in the instant appeal but he included the 2nd defendant who did not even appear before the District Land and Housing Tribunal who admitted in his written statement of defense that no spouse consent was obtained from the guarantor spouse, this was due to the

arrangement made by the appellant and the mortgagor themselves without involving the guarantor.

Arguing on the third ground, that the tribunal failed to evaluate the evidence on record, thereby reaching an erroneous decision. The 2nd respondent argued that the evidence at the tribunal reached its decision that the alleged spouse consent was improper and the trial tribunal corrected the number of the disputed property after the clarification by the parties themselves under oath. He added that concerning the names of the guarantor appearing in the marriage certificate, the fact was discussed and settled during the hearing by the tribunal and that the trial chairman had satisfied himself over the names of the 1st respondent was occasioned by typing error of which was corrected and continue to make a decision, he went on to state that the 2nd respondent clearly explains that the name Amedeus Ngimonyi which appeared in the marriage certificate was his family name but he also insisted to be known by Amedeus G. Moshu. Supporting his submission he cited the case of **Bi. Hawa Mohamed v Ally Sefu** (1983) TLR. In conclusion, the 2nd respondent urged this court to dismiss the appeal with cost.

In his rejoinder, the learned counsel for the appellant claimed that the point of objection raised by the 1st Respondent is improper. He added that a preliminary objection to the suit, appeal, or application should be raised at

the earliest stage of the case. He went on to state that in this appeal, it is improper of the 1st and 2nd respondents to raise preliminary objection on joinder of parties within the submission. It was his view that this could have been done by filing a notice of preliminary objection to the memorandum of appeal and not within the submission. He was on his view that the only preliminary objection which can be determined at any time is an objection on jurisdiction of the Court.

The learned counsel for the appellant reiterated his submission in chief. Stressing, he contended that the respondents are dancing in the bush without reckoning to the gist of ground number one of the appeal which is based on the difference of names of the 1st and 2nd Respondent in the Certificate of Marriage. Insisting, he argued that the 1st and 2nd Respondents have failed to prove that the person's name appearing in the Certificate Marriage and the 2nd respondent is the same person since there is no any deed poll to prove their claims. He submitted that the appellant in the suit had alleged and proved that the 2nd Respondent is married to one Bernadetha Paulo Lyimo and not Mary Anna Lyimo, by providing the spousal consent which she obtained during the mortgaging process when she was doing her due diligence before assigning the loan.

Submitting further, the learned counsel for the appellant contended that the appellant being the mortgagee did verify the information, and the proof of the due diligence is the tendered spousal consent, which was signed by the wife of the 2nd Respondent one Bernadetha Paulo Lyimo. Supporting his submission he cited section 114 (2) of the Land Act, Cap. 113 WHICH which was amended by the Mortgage Financing (Special Provision) Act, 2008, repealing subsection 2. Stressing, he stated that the mortgagee is deemed to have discharged his responsibility by an affidavit, written and witnessed document. He also insisted that the evidence of the 1st Respondent was conflicting and raised a doubt in the mind of any sound and reasonable person. He added that the Marriage Certificate had different names of both the 1st Respondent and the 2nd Respondent, whereas the names and the same raise a serious question of impersonation and if the 1st Respondent has any locus standi in the case as explained in our submission in chief.

On the strength of the above submission, he reiterate his submission in chief by urging this court to allow the appeal and the Judgment and Decree of the trial Tribunal be quashed and set aside with costs.

Having summarized the submissions and arguments of both learned counsels for and against the appeal, I should now be in a position to determine the appeal on which the parties bandying words. The issue for determination is ***whether the appeal is meritorious.***

Before generally canvassing the grounds of appeal, I have dispassionately considered the so-called preliminary point of objection. With due respect to Mr. Augustine, I do not think most of what he terms as a preliminary point of objection has been raised at the right instant. He tried to move this court by raising a point of objection that one party was not included in this appeal who was a party at the tribunal.

In case, Mr. Augustine and the 2nd respondent wanted to challenge the instant appeal then he was supposed to follow proper procedure, in case the respondent's Advocate wanted to challenge the instant appeal then he was supposed to challenge the same by filing a proper preliminary objection before the hearing of the appeal. Otherwise, the respondents' Advocate wants to prejudice the appellant's appeal.

For the aforesaid reasons, the respondent's point of law is disregarded. I proceed to determine the appeal on merit.

In my determination, I will consolidate the second and the third grounds because they are intertwined. The same are related to the issue of evidence on record. The first ground will be determined separately. In order, they appear.

On the first ground; whether the 1st respondent was the 2nd respondent's wife. The records reveal that the 1st respondent testified to

the effect that she is the lawful wife of the 2nd respondent and to prove the same she tendered a marriage certificate. I have scrutinized the marriage certificate and noted that in the records there is a different description of the 1st respondent, she introduced herself as Marry Ann Lyimo while in the marriage certificate the reads Marry Anaa Lyimo. The names of Ann and Anaa are different however, the first and last names are the same.

In my considered opinion, I find that the error is minor because the parties can be ordered to amend the 1st respondent's name and the court to proceed with entertaining the matter. The Court of Appeal of Tanzania in the case of **Christina Mrimi v Coca Cola Kwanza Bottlers Ltd**, Civil Application No. 113 of 2011 allowed the applicant to correct the name of the respondent, and the application was granted.

Similarly, in a recent case of **Victoria Rweyamamu Binamungu & Another v Geoffrey Kabaka**, Civil Application No. 602/08 of 2017 [TANZLII 10TH June, 2020], the Court of Appeal held that:-

“ The issue of names is designed to get a mountain out of a molehill. The error made by the applicant was made out of his knowledge since at all the time the applicant addressed the respondent by the same name...”

Applying the above authorities, the evidence on record shows that the appellant in the pleadings before the District Land and Housing Tribunal used the name of Marry Anna Lyimo. In that regard, I consider that this is a minor correction the same can be corrected. Therefore, I differ with the learned counsel for the appellant that failure to explain the discrepancies of the 1st respondent names to refer to different persons.

Concerning the 2nd respondent's names, as per the tribunal proceedings, the name of the 2nd respondent appearing in the application and documents differs from the one appearing in the marriage certificate.

In my view, the 2nd respondent did not successfully establish or prove if his names were used interchangeably on the balance of probability. The 2nd respondent testified that his name; Amedeus G. Mosha is also known by other names of Amedeus Ngimonyi. The 2nd respondent was required to prove that he has changed his names by tendering a deed poll, the same could prove that he was using both names. Therefore, in the absence of any tangible evidence to prove that the 2nd respondent used the two names interchangeably, is unsafe for the Court to agree with the sweeping averments made by the 1st and 2nd respondents. I am persuaded by the decisions of this court in the cases of **Mary Lupatu v Kulwa Itumbagija** (supra) and **Saranga Wambura Nungu v Thomas Kisheri** (supra).

As to the second and third grounds, the appellant claimed that the tribunal erred in law in shifting the burden of proof and in holding that the appellant failed to seek consent from his spouse. He also contended that the tribunal failed to evaluate the evidence on record hence reached an erroneous decision. The learned counsels for the appellant and the respondent have butting heads on the issue of spouse consent.

I had to go through the purported spouse's consent to find out whether there are any elements to prove that the Plaintiff gave her consent. The names appearing in the spouse consent are quite different from the one appearing in the marriage certificate; the 1st respondent's name is Marry Anna while in the spouse consent the name read Bernadetha Paul Lyimo, and as per the records she is the one who gave her consent over the mortgaged property.

The tribunal records further reveal that the 2nd respondent made the Bank to believe that his spouse has given her consent by furnishing a spouse consent which was relied upon by the bank to grant the said loan. It is my respectfully view that, the 2nd respondent cannot benefit from his wrongs. The 2nd respondent was aware that the name appearing in the spouse consent was not his wife's name. But he proceeded to guarantee the mortgage by using the wrong name.

The Court does not agree with the 2nd respondent that he was advised to give wrong information in regard to the spouse consent. He consciously entered into the term loan agreement as a guarantor and he is quoted to have confirmed that he was advised to find any other woman apart from her wife to give her consent before concluding the agreements. Whether he was advised wrongly or not as long his allegations are not proved then the 2nd respondent remains fully responsible for his action. The alleged claims do not exonerate the respondent from his wrongdoings.

Regulation 4 (1) of the Land (Mortgage Financing) Regulations, GN No. 355 of 2009 requires an applicant for a mortgage to declare his marital status in a prescribed form. It states:

"4 (1) The applicant for a mortgage shall be required to declare his marital status as follows:

- a) *By stating in the application form whether he is married or not;*
- b) *Subject to paragraph (a) **where the applicant states that he is married he shall state the names and address of the spouse or the spouses as the case may be; and***
- c) *Where the Applicant states that he is not married, the mortgagee shall require the Applicant to declare in an affidavit or written and witnessed*

document that he has no spouse or any other third party holding interest on the mortgaged land." (Emphasis added).

The Land Act mandates the mortgagee to undertake due diligence to ascertain that the right consent is provided. Section 161 (3) of the Land Act, Cap.113 [R.E 2019] provides that: -

(3) Where a spouse who holds land or a dwelling house for a right of occupancy in his or her name alone undertakes a disposition of that land or dwelling house, then-

*(a) where that disposition is a mortgage, **the lender shall be under a duty to make inquiries if the borrower has or, as the case may be, have consented to that mortgage accordance with the provisions of section 59 of the Law of Marriage Act;***

*(b) where that disposition assignment or a transfer of land, the assignee or transferee shall be under a duty to make inquiries of the assignor or transferor as to **whether the spouse or spouses have consented to that assignment** or transfer in accordance with section 59 of the Law of Marriage Act, **and where the aforesaid spouse undertaking the disposition deliberately misleads the lender** or, as the case may be, the assignee or transferee as to the answers to the inquiries made in accordance with paragraphs a) and (b), the disposition shall be voidable at the option of the*

spouse or spouses who have not consented to the disposition, (emphasis added).

Would had it been that the 2nd respondent did not provide a spouse's consent at all, then the one to blame would have been the Bank. I have considered the fact that each case has to be decided on its own circumstance. In the circumstances of this case, the 2nd respondent made the bank believe that his spouse has consented to mortgage their house to enable the other party to secure a loan. In case the 2nd respondent ***undertaking the disposition deliberately misleads the lender*** still I have to say that he cannot benefit from his own wrong since the records are clear that his spouse consented considering that the name appearing in the marriage certificate Amedius Ngimonyi was not cleared for admission that it was the 2nd respondent.

Contrary to the submission of the learned counsel for the respondent that it was the duty of the Bank to make an inquiry and call Bernetha Lyimo to testify, I have noted that the Bank inquired whether the spouse has consented to that assignment and to prove that the Bank took efforts to comply with the law which requires them to make sure that the 2nd respondent after stating that he was married, then he was required to state the names and address of the spouse which was done. In case the 2nd respondent could have stated that he was not married, then the mortgagee

would have been required to make the applicant declare in an affidavit or written and witnessed document that he has no spouse or any other third party holding interest on the mortgaged land which was not the case in this case.

Now, as far as the above analyses, the legal burden is on the shoulder of the one who alleges also to prove her marriage to the 2nd respondent whereas the 2nd respondent's names appearing in the application and marriage certificate are different. Was she married to the 2nd respondent? AGAIN, the 2nd respondent act of issuing a spouse consent of one Beretheda Lyimo does not prove that she was her wife. 2nd respondent claimed that he had to give the wrong name of the spouse and her picture was affixed which made the Bank believe that she was her wife and consented. I have to say that the 2nd respondent cannot benefit from his wrongdoing.

The above shortfalls should be a wake-up call to parties in cases related to mortgage specifically to the guarantor and the Bank. The guarantor must be alive to the enormous responsibility placed upon his shoulder, to make sure that the information given to the Bank is accurate and reliable. The Bank to make sure that the spouse provides detailed and correct information. The Bank is required to scrutinize the guarantor's documents and request for an original marriage certificate and certificate


of rights of occupancy concerning the property in question, to prove the existence of their marriage. The same be cleared for admission as a fit document to enable the borrower to receive the requested loan without any uncertainties.

In the upshot, I proceed to quash and set aside the District Land and Housing Tribunal decision in Land Application No. 389 of 2012 and allow the appeal without costs.

Order accordingly.

DATED at Dar es Salaam this 3rd November, 2021.




A.Z.MGEYEKWA

JUDGE

03.11.2021

Judgment delivered on 3rd November, 2021 in the presence of Mr. Augustine Rutakorozeba, learned counsel for the 1st respondent also holding brief for Mr. Mitibi, learned counsel for the appellant and Mr. Deogratius Sawele, learned counsel for the 2nd respondent.




A.Z.MGEYEKWA

JUDGE

03.11.2021

Right to appeal full explained.