

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

LAND CASE NO. 182 OF 2020

AISHA JUMA SEIF.....PLAINTIFF

VERSUS

**KIKOYO ENTERPRISES COMPANY LIMITED.....1ST DEFENDANT
HENROD YUSUPH KIKOTI.....2ND DEFENDANT
TPB BANK PLC.....3RD DEFENDANT
ABDALLAH SIMBA ABDALLAH.....4TH DEFENDANT**

JUDGMENT

Date of Final Submissions: 28/06/2022

Date of Delivery: 22/07/2022

AMOUR S. KHAMIS, J:

The present dispute goes a long way to show that legal requirement for spousal consent is meant to protect the sanctity of matrimonial institution, and further protect the matrimonial residence against risks of losing it in the event of default.

Written spousal consents are fixtures of most business transactions that involve married persons. These consents are in asset purchase agreements, mortgages and real estate transactions.

To some persons this requirement often seems unnecessary and inconvenient, especially when one spouse is not even involved in the business or property that is the subject of the transaction.

This case is a classic example of why spousal consents are so important in Tanzania's property laws.

Aisha Juma Seif is the lawful wife of Abdallah Simba Abdallah. Their marriage was solemnized in accordance to Islamic rites on 26 May 1995.

The couple are blessed with three issues: Hidaya Abdallah Simba born on 5th September 1995, Simba Abdallah Simba born on 1 June 1998 and Nathra Abdallah Simba born on 21 May 2005.

During subsistence of the couple's marriage in 2011, Aisha Juma Seif and Abdallah Simba Abdallah acquired a residential house on Plot No. 988, Block "H", C.T No. 90407, L.O No. 398383, located at Tabata Segerea area, Ilala Municipality, Dar es Salaam City.

Although the house was acquired through the couple's joint efforts, Aisha Juma Seif consented to have the property registered in the sole name of her love bird, Abdallah Simba Abdallah.

The couple moved into their only house immediately after it was bought and treated it as a matrimonial home.

While peacefully enjoying the environment of the house, sometimes in August 2020, Aisha Juma Seif was visited by two strangers who introduced themselves as officers of TPB Bank PLC.

The two strangers handed her two letters addressed to Kikoko Enterprises Company Limited and copied to Henrod Yusuph Kikoti with instructions of delivering them to her husband.

When Aisha Juma Seif hesitated to receive the letters that were not directed to her husband, the two men revealed that her matrimonial house was part of a collateral in the outstanding loan advanced by TPB Bank PLC to Kikoko Enterprises Company Limited and Henrod Yusuph Kikoti.

Upon receiving the letters, Aisha Juma Seif visited offices of TPB Bank PLC and sought consultations with the bank's officers.

In the course of consultations, she was exposed into loan agreements that her husband and one Brighton Muzungu Chiza had signed in favour of Kikoko Enterprises Company Limited.

She was made to understand that her husband subjected their matrimonial house as a collateral for a loan that stood at Tshs. 1,200,000,000/= which TPB Bank PLC advanced to Kikoko Enterprises Company Limited.

In response, Aisha Juma Seif filed the present suit to affirm the right of one spouse to void unauthorized mortgage of a matrimonial house by the other spouse.

In this case, she moved this Court for declaration that the mortgage on Plot No. 988, Block H, C.T No. 90407, L.O No. 398382,

Tabata Segerea area, Ilala Municipality, Dar es salaam City is unlawful for lack of spousal consent.

She asked the Court to make an order excluding the disputed house from the list of guarantees or collaterals in respect of the outstanding loan.

Further, Aisha Juma Seif prayed for an order against Kikoko Enterprises Company Limited, Henrod Yusuph Kikoti, TPB Bank PLC and Abdallah Simba Abdallah jointly and severally to pay damages at the sum to be determined by the Court.

Lastly, she prayed for costs of the suit and any other relief that the Court deems fit to grant.

Specifically, Aisha Juma Seif alleged that Henrod Yusuph Kikoti, Managing Director of Kikoko Enterprises Company Limited and officials of TPB Bank PLC knew her well as wife of Abdallah Simba Abdallah, but for no apparent reasons, concealed a mortgage on her matrimonial house until a default occurred.

Invoking her power as a non - consenting spouse, Aisha Juma Seif averred that her house was in danger of being disposed of rendering the family homeless wanderers as a result of an undertaking that excluded her in the first place.

She averred that the incident subjected her to mental torture on account of a huge outstanding loan.

The third and fourth defendants filed separate Written Statements of Defence while the first and second defendants filed a Joint Defence.

In a Joint Written Statement of Defence, Kikoko Enterprises Company Limited and Henrod Yusuph Kikoti disputed the plaintiff's allegations and contended that the disputed house was not a matrimonial home.

Further, the two defendants alleged that Abdallah Simba Abdallah had no wife and presented so to the bank.

In a further response, the first and second defendants asserted that the disputed house was legally owned by Abdallah Simba Abdallah who was a party to the mortgage.

In an Amended Written Statement of Defence, TPB Bank PLC subjected the plaintiff to strictest proof of the allegations and alleged that upon verification of the property in dispute before signing of the mortgage, it was revealed that Abdallah Simba Abdallah had no wife.

Further, the banker contended that Abdallah Simba Abdallah presented an affidavit to the effect that he had no wife and added that a spousal consent was not required.

Whereas the banker prayed for dismissal of the suit with costs, Abdallah Simba Abdallah filed a Written Statement of Defence conceding on execution of a mortgage in favour of Kikoko Enterprises Company Limited but prayed for declaratory order that the plaintiff did not consent for a mortgage.

Further, Abdallah Simba Abdallah contended that Kikoko Enterprises Company Limited agreed to honour conditions for the loan whose existence was concealed from the plaintiff.

In a further reply, he admitted that Aisha Juma Seif was his lawful wife and her assertions were correct.

Consequent to completion of pleadings, mediation was attempted but failed. The first and final pre – trial conferences were thus conducted in accordance to mandatory requirements of the Civil Procedure Code, Cap 33, R.E 2019.

Three issues went into record for determination, namely:

1. Whether the disputed house on Plot No. 988, Block H, C.T No. 90407, Tabata Segerea, Ilala Municipality, Dar es Salaam is a matrimonial house for the plaintiff and the fourth defendant.
2. Whether the disputed house on Plot No. 988, Block H, C.T No. 90407, Tabata Segerea, Dar es Salaam was lawfully mortgaged by the fourth defendant to the third defendant.
3. To what reliefs are the parties entitled to?

In terms of Rule 2(1) of ***THE CIVIL PROCEDURE CODE (AMENDMENT OF THE FIRST SCHEDULE) RULES, 2021*** hearing proceeded by way of written witness statements.

Trial commenced on 21 June 2022 and concluded on 28 June 2022. The plaintiff flaunted two witnesses while the third and fourth defendants had one witness each. The first and second defendants had one joint witness.

Throughout trial, Mr. Barnaba Luguwa, learned advocate, acted for the plaintiff while Ms. Adeline Elisei, learned advocate of this Court, appeared for TPB Bank PLC.

Henrod Yusuph Kikoti, the second defendant herein, represented himself and appeared as a principal officer of Kikoko Enterprises Company Limited, the first defendant. Simba Abdallah Simba, the fourth defendant, fended for himself.

Whereas on 23 June 2022, I ordered parties to file written submissions by 28 June 2022, the order was complied with by the plaintiff and the banker, TPB Bank PLC which has now changed name to Tanzania Commercial Bank PLC.

Change of the banker's name was spotted in the Written Witness Statement of DW 2 and in the final written submissions lodged by Ms. Adeline Elisei on 27 June 2022.

However, no efforts were made by either party to have the new name reflected in the pleadings.

Satisfied that the change of name did not affect the matters in controversy so far as regards to the rights and interests of the parties, I did not see a need to order otherwise bearing in mind that officials of the third defendant remained the same.

That notwithstanding, no submissions were presented by the first, second and fourth defendants.

I will now address the issues on record in seriatim. The first issue is whether the disputed house is a matrimonial house for the plaintiff and the fourth defendant.

Mr. Barnaba K. Luguwa, learned advocate for the plaintiff, contended that the two witnesses for the plaintiff, the fourth defendant and the exhibits on record, sufficiently proved that the plaintiff and fourth defendant were lawfully married.

He said the evidence established that the disputed house was bought from one Seif Rashed Omary Suleiman in the year 2011, after the plaintiff and fourth defendant were married and therefore became a matrimonial house.

The learned counsel asserted that the disputed house was used by the plaintiff and fourth defendant "for rearing" the children and thus could not be mortgaged without the wife's consent.

Ms. Adeline Elisei contended that the plaintiff failed to prove that she lived in the disputed house contrary to Section 110(1) and (2) of the Evidence Act.

She asserted that the plaintiff did not produce any document as proof of having lodged a caveat in the Land Registry to register her interest over the disputed property.

To this end, she cited SUDI KISAPA V PAULO FUTAKAMBA, LAND APPEAL NO. 15/2021, HIGH COURT OF TANZANIA AT SUMBAWANGA (unreported), LAMSHORE LIMITED AND J.S KINYANJUI V BIZANJE K.U.D.K (1999) TLR 330, BARELIA KARANGIRANGI V ASTERIA NYALWAMBWA, CIVIL APPEAL NO. 237 OF 2017 (unreported) and HADIJA ISSA ARERARY V TANZANIA POSTAL BANK (2020) 2 TLR 351.

The learned advocate attacked a marriage certificate allegedly for showing contradictory names and age.

She said that name of the Imam who presided over the marriage was briefly written as Imamu Mussa whereas during testimony, he introduced himself as Mussa Hamisi Soud.

There is no doubt that whoever desires a Court to give judgment as to any legal right or liability, dependent on existence of facts which he/she asserts must prove that those facts exist.

That notwithstanding, Section 112 of ***THE EVIDENCE ACT, CAP 6, R.E 2019*** provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence.

In ***SADIKI ALLY MKINDI V DPP, CRIMINAL APPEAL NO. 207 OF 2009*** (unreported), the Court of Appeal held that where a series of circumstances are dependent on one another, they should be read as one integrated whole and not considered separately.

In this case, three witnesses testified in support of existence of a marriage between the plaintiff and the fourth defendant.

On examination in chief, PW 1 Aisha Juma Seif testified that she was the lawful wife of Abdallah Simba Abdallah and their marriage was solemnized at Magomeni Mwembechai on 26 may 1995.

She said the marriage was blessed with three issues: Hidaya Abdallah Simba born on 5/09/1995, Simba Abdallah Simba born in the year 1998 and Nadhra Abdallah Simba born on 21 May 2005.

Regarding the disputed house and the family residence, PW 1 said:

"4.....Our matrimonial home was formerly at Magomeni Kimamba but sometimes in the year 2011, we got the news of the house which was being sold by one Seif Rashed Omary Suleiman. The house was at Tabata and I and the 4th defendant inspected it and agreed to buy it.

5. That I did not take part in the transaction of buying the same and my husband is the one who executed the said sale and the said house was registered in the name of my husband.

6. Soon after it was bought the said house, I and my family shifted in our new matrimonial home the next day and we have been staying in the said house peacefully until the 23^d day of September 2020."

On cross examination by Ms. Adeline Elisei, PW 1 said she signed both the Plaintiff and a marriage certificate (Exhibit P 1). On an apparent difference of signatures and spelling of her first name, the witness said:

"....There is no difference in my signature. Both are my signatures because I have been using names Aisha Juma Seif, Esha Juma Seif and Asha Juma Seif interchangeably. They all refer to me..."

Prior to that, PW 1 said her name was Aisha Juma Seif but it was spelt and written differently by everybody else. Whereas some called her "Asha", others referred to her as "Aisha" or "Esha".

On further cross examination, the witness admitted that age of the couple was mistakenly written in the marriage certificate, and that

efforts were underway to legally correct the same when the dispute arose.

Questioned as to why such a difference occurred, PW 1 said:

"The certificate of marriage was not written by me. It was written by the Imam who solemnized our marriage.

When the said Sheikh, Imam Musa Khamis Soud brought me the marriage certificate, I told him that he did not write the dates properly. I mean dates of the spouses. He promised to rectify it but he did not. We did not see an urgent need to make corrections at that time so we kept the certificate.

In our family, I have been referred to interchangeably as Eshe, Aisha, Asha but all refer to me. The good thing is that all those who interchangeably use Eshe, Aisha and Asha always maintain the surname Seif Juma which avoid any confusion."

Re - examined on who stayed in the disputed house, PW 1 said:

"Truly I am the one who stays in the disputed house. All bodaboda drivers in our street, the ten cell leaders of the Street Council (Serikali za Mtaa) know me. They refer to me as Mama Simba. I am the only Mama Simba in that street."

DW 3 Abdallah Simba Abdallah confirmed on PW 1's evidence and explained on the couple's residence prior to and after marriage.

He also validated PW 1's assertions on contents of the marriage certificate and the role of the Imam, thus:

"...At the time of marrying the plaintiff I used to live in Magomeni Mikumi House No. 29 and the plaintiff used to stay at her father's house in Kagera (area) which is part of Mwembechai area. Her father and family stayed in House No. 5, Magomeni Kagera.

I married my wife on 26/05/1995. Iman Musa 9PW 2) solemnized our marriage. She was 21 years old at the time of the marriage. By then I was 25 25 years old.

Currently my wife is 48 years old and I am 52 years old.

Our marriage certificate was wrongly written ages of my wife and I. Because of that discrepancy, we decided to summon that sheikh (PW 2) in Court to clarify because he is the one who presided over the marriage."

On cross examination by Ms. Adeline Elisei, DW 3 said that:

"The Imam was consulted as regards to the ages of my wife and I and said that in case we wanted the changes, we should go to him and make amendments.

I have been travelling for all these years and did not go to the Sheikh for corrections of the marriage certificate.

Both my wife and I travel a lot and we have our passports to show those travels. I am ready to show them to you."

On further cross examination by Ms. Elisei, DW 3 Abdallah Simba Abdallah stated that:

"My wife is 48 years. She has no experience of standing and testifying in Court. I am her lawful husband and I even brought pictures of our marriage. I have three (3) children with her and therefore I very well know her age."

When further pressed by Ms. Elisei to clarify on the plaintiff's age, DW 3 Abdallah Simba Abdallah testified that:

"She is not 42 but 48 years old. I am very sure of that. I can show you our marriage pictures. I have them now."

PW 2 Musa Hamisi Soud told this Court that he was an Islamic Cleric, Sheikh and Imam at Mwembechai Mosque, Magomeni Mwembechai, Kinondoni District, Dar es Salaam City.

The 62 years old Sheikh, said he served as Imam, Sheikh and Cleric at Mwembechai Mosque for over 30 years and that he presided over the marriage of the plaintiff and the fourth defendant.

On examination by Mr. Barnaba Luguwa, the Sheikh said that:

"..I presided over their marriage ceremony which I conducted at the home of Mzee Juma Seif at Magomeni Kagera on the 26th day of May, 1995 and I did that as the Registered Commissioner of Marriage with a certificate and enrolled with number 9732.

4. That soon after their marriage, I issued them with Shahada ya Ndoa which is provided by BAKWATA but I required them to come to the office and sign and collect their marriage certificate which were lying in our offices to date and when

they came to our offices, we required them to pay for it and we have allowed them to sign and they have collected the same...

5. I am not aware of any divorce between the said spouses because currently they are not my neighbours."

On further examination by Mr. Barnaba Luguwa regarding Exhibit P 1 – a marriage certificate, PW 2 said that:

"I know this marriage certificate that I issued to the husband and wife.

The husband was Abdallah Simba Abdallah and wife was Eshe Juma Seif. The marriage was celebrated on 26/06/1995.

The husband was 45 years and wife was 41 years. This was a mistake I made because the particulars were not given by the spouses. In Islamic marriages usually particulars are given by near relatives because the wife (bride) is at that time at a different place from where the marriage is solemnised.

Subsequently the spouses noticed that the age written on the document (certificate) was wrongly written and I advised them to come for corrections but did not do so."

On cross examination by Ms. Adeline Elisei, PW 2 stated that:

"I know the plaintiff and the fourth defendant as the people that I presided over their marriage.

The marriage took place in the house of Mzee Juma Seif. It is House no. 5, Magomeni Kagera...Magomeni Kagera is also in Mwembechai area."

On further cross examination, the Islamic Cleric said that Imam Mussa and Musa/Mussa Hamisi Soud referred to one and the same person; himself.

Regarding the plaintiff's names as shown on the marriage certificate, PW 2 stated that:

"Aisha Juma Seif is the same person referred to in the certificate as Esha Juma Seif.

The marriage was celebrated on 26/05/1995 and the bride was aged 21 years. It is true that 27 years lapsed from date of marriage to date....

Imam Musa is just an abbreviation of Imam Musa Hamisi Soud..."

On further questioning by Ms. Adeline Elisei, PW 2 Musa Hamisi Soud, stated that:

"The marriage certificate show the same was celebrated at Kimamba Street. Kimamba Street is in Kagera and which is generally in Mwembechai area..."

On re – examination by Mr. Barnaba Luguwa, PW 2 gave explanation on the distinction between Exhibit P 1, a marriage certificate issued under the auspices of Baraza Kuu la Waislam Tanzania (BAKWATA) and a certificate of marriage issued by the Registrar of Marriages which the couple did not collect from his office until date of his testimony.

On further questions, the witness stated that:

"BAKWATA certificate has a limited application as compared to marriage certificates issued by the Registrar of Marriages.

Para. 4 of my statement of a witness meant that the plaintiff and 4th defendant had not collected a marriage certificate issued by the Government (Registrar of Marriages)."

When pressed to inform the Court on marital status of the plaintiff and the fourth defendant, the Sheikh had this to say:

"I confirm to this Court that I am the one who presided over marriage of the plaintiff and the fourth defendant and there is no doubt on that. They are husband and wife."

In ***LEONARD JONATHAN V REPUBLIC (2003) TLR 331***, the Court revisited Section 9(1) of the Law of Marriage Act, 1971 which is now the Law of Marriage Act, Cap 29, R.E 2019 and concluded that a marriage means a voluntary union of a man and a woman intended to last for their joint lives.

Section 25 of ***THE LAW OF MARRIAGE ACT, CAP 29 R.E 2019*** provides the manner of contracting marriage. Among others, the provision (Section 25 (1) (b)) states that a marriage may be contracted in Tanzania in civil form or where both the parties belong to a specified religion, according to the rites of that religion.

PW 1, PW 2 and DW 3 testified that a marriage between the plaintiff and the fourth defendant was celebrated in accordance to Islamic rites.

In Islam, marriage or *nikah* requires acceptance of the groom, the bride and consent of the custodian of the bride (wali). The wali of the bride is normally a male relative of the bride, preferably her father.

In an article titled ***THE LEGAL MARRIAGE CONTRACT IN ISLAM, DOTDASH MEREDITH PUBLISHING FAMILY, 30 APRIL 2018***, the distinguished author writes:

"In Islam, marriage is considered both a social agreement and a legal contract. In modern times, the marriage contract is signed in the presence of an Islamic judge, imam, or trusted community elder who is familiar with Islamic Law. The process of signing the contract is usually a private affair, involving only the immediate families of the bride and groom. The contract itself is known as nikah."

It was not disputed that PW 2 Mussa Hamisi Soud is an Islamic Scholar and an experienced Imam at Mwembechai Mosque located in Mwembechai area, Magomeni, Dar es Salaam.

The said sheikh confirmed to this Court that all requirements for a valid nikah were duly complied with before he officiated a marriage between the plaintiff and the fourth defendant on 26 May 1995.

PW 1 Aisha Juma Seif and DW 3 Abdallah Simba Abdallah testified that they were bride and groom in a marriage presided over by PW 2 on 26 May 1995 and are still married to date.

There is on record several documentary evidence corroborating existence of the disputed marriage. These are certificate of birth for Simba Abdallah Simba (Exhibit P 2), certificate of birth for Hidaya

Abdallah Simba (Exhibit P 3) and clinic card for Nadhra Abdallah Simba (Exhibit P 4).

Exhibit P 3 is a certificate of birth no. A 00116096 issued by Registrar General of Births and Deaths on 22 November 2001. It shows Abdallah Simba Abdallah was born on 5 September 1995 at Muhimbili Medical Centre, Dar es Salaam.

The certificate show mother of the child is Asha daughter of Juma Sefu (Seif) and father is Abdallah Simba Abdallah.

Exhibit P 2 is certificate of birth no. B 0734727 issued by the the District Registrar for Births and Deaths, Ilala, Dar es Salaam. Name of the child is Simba Abdallah Simba, male, born on 1 June 1998 at Muhimbili Medical Centre, Dar es Salaam.

The child's parents were named as Asha Juma Seifu and Abdallah Simba.

Exhibit P 4 is a clinic card for Nadhra Abdallah whose registration number is 938/05.

The card issued by Magomeni MCH show the child (Nadhra) was born on 21 May 2005 at MNH Hospital (Muhimbili National Hospital). Parents are named as Esha Juma and Abdallah Simba.

The undisputed contents of exhibits P 2, P 3 and P 4 sufficiently proves that the three children were born from the union of the plaintiff and the fourth defendant herein. There could not be such parentage if the said parties were not married as evidenced by Exhibit P 1.

From the explanations given by PW 1, PW 2 and DW 3, I am satisfied that Esha Juma Seif named in the marriage certificate is the

same one referred to as Aisha Juma Seif and or Asha Juma Seif in some documents, who is the plaintiff herein.

Consequently, I hold that on weight of the evidence on record, the plaintiff and the fourth defendant are lawful wife and husband respectively.

The second and final limb of the first issue is whether the disputed house is a matrimonial house.

Section 2 of ***THE LAW OF MARRIAGE ACT*** (supra) defines matrimonial home as a building or part of a building in which the husband and wife ordinarily resides.

Matrimonial home includes a curtilage and any outbuildings thereon where a building and its curtilage are occupied for residential purpose only.

Where a building is on or occupied in conjunction with agricultural land, any land allocated by the husband or the wife, as the case may be, to his or her spouse for her or his exclusive use is also considered as a matrimonial home.

Section 60 of ***THE LAW OF MARRIAGES ACT*** provides that where during subsistence of a marriage, any property is acquired in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse.

The section further provides that where the property acquired during subsistence of the parties' marriage is acquired in the names of

the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.

Nevertheless, this provision requires re-consideration in view of Section 161 of ***THE LAND ACT, CAP 113 R.E 2019*** which provides for co – occupancy and other relationships between spouses.

Section 161 (1) of ***THE LAND ACT*** provides that where a spouse obtains land under a right of occupancy for the co –occupation of both spouses, or where there is more than one wife, all spouses, there shall be a presumption that, unless a provision in the certificate of occupancy or certificate of customary occupancy clearly states that one spouse is taking the land as occupier in common, the spouses will hold the land as occupiers in common and, unless the presumption is rebutted, the Registrar of Titles shall register the spouses as occupiers in common.

Section 161 (2) is more relevant to the present case. It provides that where land held for a right of occupancy is held in the name of one spouse only but the other spouse or spouses contribute by their labour to the productivity, upkeep and improvement of the land, that spouses(s) shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an occupancy in common with the spouse in whose name the certificate of occupancy or customary certificate of occupancy has been registered.

In ***COSMAS K. MUTHEMBWA V EUNICE KYALO MUTHEMBWA (2002) 1 E.A 186***, the Court of Appeal of Kenya

observed that it is impracticable to take account of the respective contributions of the husband and wife in the management of a home.

Having observed so, the Kenyan Court of Appeal persuasively held that:

"Where a property is bought during coverture and is registered in the name of one spouse, a rebuttable presumption of fact is that it was bought with joint funds."

The evidence on record in this case revealed that the plaintiff and the fourth defendant were married on 26 May 1995.

PW 1 Aisha Juma Seif and DW 3 Abdallah Simba Abdallah testified that a house on Plot No. 988, Block H, C.T No. 90407, L.O No. 398382, Tabata Segerea, Ilala Municipality, Dar es Salaam City was bought from Seif Rashed Omary Suleiman in the year 2011.

It was equally testified by PW 1 and DW 3 that throughout the time from 2011 to date, them and their children, are living in the disputed house.

Whereas DW 2 Tito Nilla Kissanga, Senior Manager, Loan Recovery responsible for loan analysis, disbursements, follow ups and recovery with TPB Bank PLC, said the disputed property was visited before signing of a mortgage, he conceded that personally he never visited the house.

On cross examination by Mr. Barnaba Luguwa, DW 2 said his bank did not have any records as to valuation of the disputed house and was not able to state as to who visited the house on behalf of the third defendant.

On further cross examination, the witness said he was employed by the third defendant in the year 2018 and therefore did not take part in the disputed transaction. His evidence was generally hearsay.

The other defendants, Kikoko Enterprises Company Limited, and Henrod Yusuph Kikoti did not lead any evidence to contradict PW 1 and DW 3.

That being the case, I hold as a fact, that the disputed house was purchased during coverture that is subsistence of the couple's marriage, and is currently occupied by the plaintiff and the fourth defendant. It is therefore a matrimonial house and matrimonial home in terms of Section 2 of the Law of Marriage Act.

The second issue is whether the disputed house was lawfully mortgaged by the fourth defendant to the third defendant.

In Paragraph 9 of the Plaintiff, the plaintiff averred that the disputed house was mortgaged by the fourth defendant to TPB Bank PLC as a collateral for a loan of TZS 1,200,000,000/= which Kikoko Enterprises Company Limited was advanced by the bank.

In its Amended Written Statement of Defence, the third defendant, TPB Bank PLC admitted the assertions and pleaded that on several occasions, its officers made follow ups following the event of default and served respective notices.

In paragraph 7 of the Joint Written Statement of Defence, the first and second defendants averred that the fourth defendant was a party to the mortgage.

Section 161 (3) (a) of **THE LAND ACT** (supra) provides that where a spouse 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 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 in accordance with the provisions of Section 59 of the Law of Marriage Act.

Section 59 (1) of **THE LAW OF MARRIAGE ACT, CAP 29, R.E 2019** provides that where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

These provisions were tested in **SAMWEL OLUNG'A IGOGO AND 2 OTHERS V SOCIAL ACTION TRUST FUND AND OTHERS (2005) TLR 343**, wherein it was held that:

"A lender is now required not only to conduct a search in the land registry but also has the duty to make inquiries as to whether the borrower's spouse has consented to the mortgage.

The mortgage of the matrimonial home will only be valid if any document or form used in applying for such mortgage is

signed or there is evidence from the document that it has been consented to by the spouse of the borrower living in the matrimonial home."

In a Written Witness Statement adopted as examination in chief, DW 2 Tito Nilla Kisanga stated that through a loan agreement dated 2 May 2016, TPB Bank PLC advanced to the first defendant a loan facility to the tune of TZS 1,200,000,000/= to be repaid within 36 months and an overdraft facility of TZS 300,000,000/= to be repaid within 12 months.

He testified that the loan was secured by several properties including a mortgage over the disputed house registered in the name of Abdallah Simba Abdallah, the fourth defendant herein.

The witness for the bank further testified that upon instruction of the third defendant, Abdallah Simba Abdallah presented affidavits stating that he was single at that moment.

He further testified that *"upon our visit to the property we did not see any sign of the plaintiff"*.

On cross examination by Mr. Barnaba Luguwa, DW 2 who was not in the third defendant's employment at the time of execution of the disputed mortgage, stated that:

"We have no records as to who stayed in the disputed house at the time of issuing the loan.

I do not know if the plaintiff and her children are living in the disputed house. The disputed house is fully finished not a "pagale".

It was not our intention to establish who stayed in the disputed house at the time of the loan.

I only tendered loan agreement of 2016. I am aware that parties also signed a loan agreement in 2018..."

On examination in chief, DW 3 Abdallah Simba Abdallah, told this Court that:

"The agreements between the first, second defendants and I were made in his office at Kariakoo area, Dar es Salaam.

I was taken or introduced to Kikoko by one Asiluna and Kikoko told me that he wanted a certificate of title to guarantee his loan with the bank.

I did hide this fact from my wife and I personally followed up with Kikoko and the bank without involving my wife.

When Kikoko failed to repay the loan, Kikoko, bank officials and I sat down and asked Kikoko as to how he was going to repay the loan..."

According to **CAMBRIDGE ENGLISH DICTIONARY**, inquiries means the act of asking for information. It also refers to an official process to discover the facts about something bad that has happened.

An inquiry is also an official attempt to discover the facts about something.

In terms of Section 161 (3) (a) of **THE LAND ACT**, the third defendant, TPB Bank PLC was required to discover the facts necessary

to establish the fourth defendant's marital status before accepting the disputed property as a collateral for the loan in favour of the first defendant.

Contrary to that requirement, DW 2 stated under oath that it relied on a mere affidavit presented by the fourth defendant alleging that he was not married.

A reasonable banker in my view, focused to comply with the statutory duty imposed on him by Section 161 (3) (a) of the Land Act, will visit the land registry to establish official status of the registered land and conduct due diligence on the property by questioning local leaders such as Street Council Chairperson, Street or Ward Executive Officer, Ten Cell leader for the area and neighbors of the house intended to be mortgaged or used for any other disposition.

In so doing, the banker will document the inquiry process and keep all correspondences involved in the exercise including a valuation report.

The findings will be expected to come out with the plot numbers, location, mortgagor's marital status, value of the property, current occupants of the property, relevant names of the local leaders in the area, particulars as to neighborhood with names of adjacent neighbours if any, and any other relevant information proving that an actual site visit to the property and questioning of relevant persons were made.

Where the said property is involved in a dispute or any other legal process such as application or petition for letters of

administration, the banker will tail the process and keep records on its findings, if any.

Going by the testimony of DW 2 Tito Nilla Kisanga, TPB Bank PLC did not discharge its duty under Section 161 (3) (a) of the Land Act.

Exhibits D 1 and D 2, the affidavits by the fourth defendant written in both English and Kiswahili languages, cannot, in my view, absolve the third defendant from a failed statutory duty.

From the evidence on record and the legal position as analyzed above, I am fully satisfied that a purported mortgage by the fourth defendant to the third defendant was and still is not valid for lack of a spousal consent and cannot be allowed to prejudice the plaintiff.

The last issue is related to the reliefs that parties are entitled to. Having determined the two substantive issues as above, I have no hesitation to find that the suit was proved to the standards required in civil cases.

The plaintiff proved all necessary facts in the case but no sufficient details were supplied as to justify grant of an order for damages.

Consequently, the following orders are hereby made in favour of the plaintiff:

1. That the suit partly succeeds.
2. That mortgage in respect of a house on Plot No. 988, Block H, C.T No. 90407, L.O No. 398382, Tabata Segerea, Ilala

Municipality, Dar es Salaam is hereby declared unlawful for lack of a spousal consent.

3. That a property on Plot No. 988, Block H, C.T No. 90407, L.O No. 398382, Tabata Segerea, Ilala Municipality, Dar es Salaam is hereby excluded from the list of collaterals for a mortgage in favour of the first (and second) defendants.
4. That costs to follow events.

It is so ordered.



A handwritten signature in blue ink, appearing to read "Amour S. Khamis", is written over the seal.

AMOUR S. KHAMIS
JUDGE
22/07/2022

ORDER

Judgment delivered in chambers in presence of the plaintiff, the second defendant and the fourth defendant in person. Mr. Henrod Y. Kikoti and Mr. Daudet Pius Malisa appeared as principal officers of the first and third defendants. Right of appeal explained.



A handwritten signature in blue ink, appearing to read "Amour S. Khamis", is written over the seal.

AMOUR S. KHAMIS
JUDGE
22/07/2022