IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL N0. 285 OF 2021

(From the Judgment and Decree of the District Land and Housing Tribunal for Temeke at Temeke in Land Application No. 330 of 2015 delivered by Hon. C.P P.I Chinyele dated on 1st November, 2021)

ACCESS BANK TZ LTD .....APPELLANT

VERSUS

HARRIET JOHN HAULE ..... 1ST RESPONDENT

ANDEKIRWA AMANI MINJA .....2ND RESPONDENT

NOLINO AUCTION MART ..... 3RD RESPONDENT

ISSA YASSY ATHUMAN .....4TH RESPONDENT

KILEMILE HASSAN .....5TH RESPONDENT

EPI MARK URIO ..... 6TH RESPONDENT

Date of last Order: 20/09/2022
Date of Judgment:03/10/2022

JUDGMENT

OMARI, J.:

The Appellant, Access Bank Tanzania Ltd approached this court because they are aggrieved by the decision of Hon. Chinyele (Chairperson) in the District Land and Housing Tribunal for Temeke (DLHT) in Land Application No.330 of 2015. The dispute centres on house No. TMK 024311 located in Mtoni Relini, Temeke Dar es Salaam. The said house is alleged to belong to the 1st

Respondent in this appeal, Harriet John Haule and one Andekirwa Aman Minja, the 2nd Respondent; who is also alleged to be the husband of the 1st Respondent.

To get a grasp of the facts let me summarize what transpired in the DLHT. The Respondent (Hariet John Haule) filed Land Application No.330 of 2015 which had six Respondents that is; Andekirwa Amani Minja, Access Bank (T) Ltd (the current Appellant), Nolino Auction Mart, Issa Yassy Athumani, Kilemile Hassan and Epimark Urio before the said DLHT. The gist of the Application was that, unknown to her and without her consent the then 1st Respondent mortgaged the house in dispute to the 2nd Respondent in favour of the 4th and 5th Respondents to secure a personal loan. She became aware of the same on 27 December, 2015 when the 3rd Respondent advertised an auction for the sale of the house and in fact sold the same to the 6th Respondent.

In the DLHT she sought four reliefs *inter alia*; the house sold be declared a matrimonial home and a declaration that the sale of the house is null and void for want of the Applicant's consent. At the same time, she filed for an injunction order restraining the Respondents from removing or doing

whatsoever with the house in dispute pending determination of the main Application.

In the Appellant's (the then 2nd Respondent) defence they maintained that the then 1st Respondent wilfully guaranteed the 4th and 5th Respondents to obtain a personal loan to the tune of TZS 20,000,000/= being the principal sum plus interest from the 2nd Respondent. They also went on to say spousal consent could not be sought for the 1st Respondent was not married. When the 4th and 5th Respondent defaulted in their payments as per the loan guarantee and collateral agreements and contracts respectively the debt had to be realized. On the other hand, the first respondent admitted being married to the Applicant in August, 2003, stating that there was a misunderstanding between him and his wife at the time of making the guarantee thus, he chose to neither involve her nor seek her consent. He contended that she deserved the reliefs she claimed in her Application.

The 6th Respondent in his defence maintained to have purchased the suit property lawfully from the 2nd Respondent. He tendered before the DLHT the certificate of sale and receipt from Nolic Company Ltd, the then 3rd Respondent. In the decision, the Tribunal Chairperson directed themselves to three issues that is:

1. If the Applicant is the Respondent's wife;
2. If the first issue is in the affirmative, whether the suit property was legally guaranteed for a mortgage; and
3. What reliefs were the parties entitled to.

On the first issue, the Chairperson in the judgment explained that there was no contract produced before the Tribunal for it to see who was the guarantor of the loan. Likewise, neither the spousal consent nor Affidavit in lieu of a spousal consent was produced by any of the parties for the Tribunal to verify. The only document on record from the 2nd Respondent was a loan status schedule which was an exhibit marked A-1. However, the loan status had the name of Athuman Yassy Issa and not that of the 1st Respondent.

The 1st Respondent admitted in his replies to also being Philmin Minja who is married to Harriet Haule (the then Applicant). The Applicant submitted a marriage certificate between herself and Philmin Minja. The Chairperson found they were married.

On the second issue the Chairperson found that since there was no spousal consent then the loan guarantee was void. The Chairperson made reference to S.161 (3) of the Land Act, Cap 113 (RE 2019) (the LA) and further

reference was made to two decisions of this court that is; **Rael Kazimoto v.Mwajabu Yusuph Matumbo and Alfonsi Guywile**, High Court Land Division Land Case 58 of 2004 (unreported) and **Hellena Kususya v. Deninis Mathew Mabubu and 2 others** , Land Case No. 432 of 2017 High Court Land Division (unreported). Both of which held a mortgage guarantee agreement was void for want of spousal consent.

On the third and last issue, that is what reliefs are the parties entitled to. In the judgement; the Chairperson as legally required under section 24 of the Land Disputes Courts Act Cap 216 (RE 2009) (the LDCA) explained their reason for departing from the opinions of assessors that the Application should be dismissed since the Applicant and 1st Respondent are not married. The Chairperson explained that the reason for departing from the said opinions was that the 1st Respondent did not defend himself from the claim that he is married to the Applicant and the Applicant confirmed that that 1st Respondent is her husband who guaranteed the loan using one of his names while the other (on the marriage certificate) is his baptismal name. The Application was then granted with costs.

It is against this background that the Appellant through their amended Memorandum of Appeal is before this court preferring an appeal on two grounds namely;

1. The Chairperson erred in law and fact by holding the 1st Respondent (hereinabove) was the lawful wife of the 2nd Respondent in Land Application No. 330 of 2015 without lawful justification; and that
2. The trial Chairperson erred in law and fact for failure to pinpoint and record properly the evidence adduced by the Appellant's witnesses.

And, it is through those grounds that the appellant prayed that this court quash and set aside the judgement and subsequent orders arising therefrom Land Application No. 330 of 2015, costs and any other reliefs that this court may deem fit to grant.

It is also important to note that, the Appellant first preferred this appeal against the 1st Respondent only and pursuant to an order by this court dated 21 April, 2022 they amended their Memorandum of Appeal to include the other five Respondents. It should also be noted that pursuant to an order of this court the 3rd, 4th and 5th Respondents were served through publication

in the Mwananchi newspaper of 10 August, 2022, all the same, they never appeared in this appeal.

At the hearing, the Appellant enjoyed the services of Sylvester Mulokozi learned advocate while the 1st Respondent enjoyed the services of Iddi Mrema learned advocate. One Ruwaichi Minja, the co-administrator of the 2nd Respondent's estate stood in his behalf. The 6th Respondent was also represented by the administratrix of his estate one Caroline Epimark Urio.

In his submissions counsel for the Appellant reiterated the two grounds on their Memorandum of Appeal and after praying that the appeal be granted with costs and the judgment of the DLHT be quashed and set aside; he went on to submit on each ground in detail.

He explained that Harriet Haule filed Land Application No. 330 of 2015 at the DLHT, where she told the tribunal she was the lawful wife of Andekirwa Amani Minja. He went on to explain that she produced a marriage certificate, which had the name Philmin Minja as the husband and not Andekirwa Amani Minja. He explained that those were two different people. Making reference to the 1st Respondent's contention that Philmin Minja or Philmin Michael Minja were her husband's baptismal names, the learned advocate averred

that she had not produced any baptismal certificate or any other identification, deed poll or affidavit that he goes by all the names and they are used interchangeably. To augment his submission, he cited the case of **International Commercial Bank Limited vs. Mary Anna Lyimo and another,** Land Appeal No. 186 of 2020, High Court of Tanzania Land Division (Unreported) the court held the view that the Respondents there in did not prove that their names are used interchangeably. The Appellant's counsel concluded the first ground by stating that the DLHT chairperson was wrong to conclude that Andekirwa Amani Minja and Philmin Minja were the same person.

At this point it is probably noteworthy to observe that there is nothing on record to task the 2nd Respondent to bring in any evidence that he is the same person bearing the said names. The Chairperson in their judgement on pages 9-10 observed that:

> *'Mkopo ulichukuliwa 2014 na ndoa ilifungwa 2003. Mdaiwa wa kwanza alichagua kukopa kwa kutumia jina la Andekirwa Aman Minja. Lakini hakuna mkataba wa mkopo uliotolewa na upande wowote ili Baraza lione dhamana ilisajiliwa kwa jina gani. Hakuna notice yoyote ililetwa na shahidi yoyote*

kujiridhisha na jina la mkopaji' (This can loosely be translated to: *The marriage was contracted in 2003 and the loan was secured in 2014. The 1st Respondent choose to secure the loan using the name Andekirwa Amani Minja. There is no contract/agreement produced by any side for the Tribunal to see the name under which the guarantee was signed. There's also no notice issued by any of the parties to ascertain the name of the guarantor.)*

Before beginning his submission on the first ground of appeal, the 1st Respondent's learned advocate adopted the record of proceedings, judgment and orders as delivered by the Chairperson in Land Application 330 of 2015. He later went on to say they dispute the appeal before this court and pray for the decision and orders in Land Application 330 of 2015 be upheld and the appeal be dismissed with costs.

On the first ground of appeal, the 1st Respondent's learned advocate explained that it was true that the 1st Respondent was the wife of the 2nd Respondent. Andekirwa and Philmin Minja were one and the same person. The learned advocate also pointed out in his reply the 2nd Respondent confirmed that the person in court as the 1st Respondent is his wife. Her consent was not sought and obtained because at the time there was a

misunderstanding. This, in his view, confirms the fact that consent was not sought or granted. The learned advocate went on to explain that the 2nd Respondent had submitted an affidavit of his names. However, our perusal of the records did not reveal any affidavit.

The learned advocate for the 1st Respondent went on with his submission by distinguishing the case of **International Commercial Bank Limited vs. Mary Anna Lyimo and another** *(supra)* cited by the learned advocate for the Appellant stating that in this appeal the wife's name is not an issue as it were in the supplied case. He went on to say that the Appellant (the 2nd Respondent in the Tribunal) had a list of documents said to have been tendered but other than the loan status schedule which did not bear the name of the guarantor nothing else was produced to enable the tribunal to properly ascertain who was the guarantor of the loan. He added that the 2nd Respondent is since deceased. Therefore, the 1st Respondent's husband is now deceased. The court should establish whether the bank's client Andekirwa Amani Minja is alive. He passionately ended his submission on this point by saying Andekirwa Amani Minja and Philmin Minja are the same person.

While undoubtedly a dangerous path to tread on; I am persuaded to tread it because in the trial tribunal the Appellant did not produce anything that proves who is the actual guarantor and what are his or her names. Other than the evidence of SU2 who did not even remember if they had documents in their files, there was nothing else from the Appellant who could have avoided the long and complex submissions by actually producing what they had stated in Para 7 of the Written Statement of Defense for the Amended Application as annextures. This court should not be put in a position where it has to conjure up reasons as to why they chose not to do that, and it shall not.

In my view, the 2nd Respondent did not do a very good job of proving that all those names are his and they are used interchangeably in the trial tribunal. On the other hand, the Appellant also failed to defend their case in the trial tribunal. They maintained that their client was not married but failed to produce evidence to support that. It is for these reasons that I agree with the trial Chairperson that 1st and 2nd Respondents were married.

With the view that if the 1st and 2nd Respondent are husband and wife, the suit premises become matrimonial home or in the words of the learned advocate for the Appellant, 'matrimonial property.' He explained that under

section 112 (2) of the LA which provides for the meaning of a matrimonial home, that description cannot apply in this particular context since the 1st Respondent needs to have been living in the house for it to be considered a matrimonial home. The 2nd Respondent through one Ruwaichi Minja in his reply told this court that the house belonged to his parents (the 1st and 2nd Respondents), it was a family home. In her reply the 6th Respondent told this court that they bought the house from the 2nd Respondent in 2015, however she knew the house since 1999 so it could not have been built in 2003 more so it could not be a family home since they (the 1st and 2nd Respondents did not live there).

On the submission that the 1st Respondent did not live in the suit premises thus, it cannot be regarded as a matrimonial property or home; the learned advocate for the 1st Respondent averred that the 1st Respondent testified in the trial tribunal that she had in fact left the said house when the 6th Respondent began disturbing them seeking to take possession of the house. Our perusal of the record confirms this testimony. The learned counsel explained that the 1st Respondent was demanding for her 'matrimonial house' or matrimonial property which she built jointly with her husband. The

same was used to guarantee a loan by the said husband without her consent and in effect the house was sold to the 6th Respondent.

We should perhaps at this juncture deal with the issue as to what is a matrimonial home and matrimonial property and whether the two can and or should be used interchangeably as used by the learned advocates in this appeal. Simply put, matrimonial properties are properties or assets that spouses acquire during the subsistence of their marriage. These can be assets that were acquired by their joint efforts and or those that were agreed upon or acquired with a view that they will be matrimonial properties or assets.

In my view not every matrimonial property (in the form of a house or dwelling) would then become a matrimonial home since there are special provisions regarding that and it also has an added qualification that the spouses need to be residing in the said home; therefore, it is wrong to use the two terms interchangeably since they are legally and conceptually distinct. What is before us then, is the question whether the house at the centre of the dispute is a matrimonial home. Section 111(2) of the LA reads:

> *'In this Part, unless the context otherwise requires-*
> *"matrimonial home" means the building or part of a*

building in which the husband and wife ordinarily reside together and includes...'

This is basically the same definition that is in section 3 of the Law of Marriage Act, Cap 29 (RE 2019) which should be read together with section 59 of the same law which has special provisions as regarding the matrimonial home. As for the procedure of mortgaging a matrimonial home this is very clearly provided for in section 114 of the LA which for avoidance of doubt we shall reproduce and discuss hereunder:

'(1) A mortgage of a matrimonial home including a customary mortgage of a matrimonial home shall be valid only if-(a) any document or form used in applying for such a mortgage is signed by, or there is evidence from the document that it has been assented to by the mortgagor and the spouses or spouses of the mortgagor living in that matrimonial home; or (b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses living in that matrimonial home.' (Emphasis supplied)

As per the above subsection for a mortgage of a matrimonial home to be valid spousal consent has to be sought and given whether in the form or any other document used to grant the mortgage. It can also be valid if there is

evidence of assent by the spouse or spouses. The Appellant did not produce any of the said documents. Furthermore, sub section (2) of section 114 of the LA provides further that;

> *'For the purpose of subsection (1), it shall be the responsibility of a mortgagor to disclose that he has a spouse or not and upon such disclosure the mortgagee shall be under the responsibility to take reasonable steps to verify whether the applicant for a mortgage has or does not have a spouse.' (Emphasis supplied)*

The law puts the onus on both the mortgagor (to disclose his marital status) and the mortgagee to verify the information supplied. Additionally, subsection (3) of section 114 of the LA provides further that:

> *'A mortgagee shall be deemed to have discharged the responsibility for ascertaining the marital status of the applicant and any spouse identified by the applicant if, by an affidavit or written and witnessed document, the applicant declares that there were spouse or any other third party holding interest in the mortgaged land. (sic)'*

While I am mindful of the above subsection has a construction problem in the way it is worded, I will attempt to make a purposive interpretation of the same. It would seem to me the framers were intending establish that in the

process of granting a mortgage (and verifying issues of spousal consent) the mortgagee shall be deemed to have discharged the responsibility for ascertaining the marital status of the applicant and any spouse identified by the applicant if, by an affidavit or written and witnessed document, the applicant makes a declaration that they have no spouse and there is no third party with an interest in the said property.

In the instant Appeal, the 2nd Respondent had stated that he has a wife, that is the 1st Respondent, and at no point in time denied this fact. He has also admitted that there was in fact no spousal consent since they were going through some marital squabble at the time and he did not want to involve his wife. However, he did not tell the Tribunal how he was able to guarantee the loan without a spousal consent or any other document as provided for in section 114 (2) and (3) of the LA.

The Appellant on the other hand did not produce any document in the Tribunal so that it could verify that indeed the 2nd Respondent had a spousal consent or an affidavit or any other document as provided for in subsection (2) and (3) of section 114 of the LA. This would have depicted that there was a disclosure and some measure of verification of the information they

received. The Appellant's witness testified in the Tribunal that they were not sure whether the documents are on file in the bank.

Since the 2nd Respondent never denied being married to the 1st Respondent, he actually admitted the same; one cannot on a balance of probability assert that the lender was misled deliberately since they have actually failed to produce anything to prove that there was actual and deliberate misleading (if any) on the part of the 2nd Respondent. At this point I think it is important to also refer to section 114(4) of the LA, which provides:

> *'An applicant commits an offence who, by an affidavit or a written and witnessed document, knowingly gives false information to the mortgagee in relation to existence of a spouse or any other third party and, upon conviction shall be liable to a fine of not less than one half of the value of the loan money or to imprisonment for a term of not less than twelve months.'*

My reading of the above provision is that; if for instance, at some point in time the Appellant held the view that the 2nd Respondent had given them false information, that is, he is not married (or married to someone else not the 1st Respondent) while in fact he was married they could have relied on the above subsection to bring him to justice. However, they maintained that

he at the time, was not married but failed to produce the declaration he made to that effect.

Submitting on the second ground, that the Chairperson erred in recording the evidence; the learned advocate for the Appellant explained that while recording evidence the tribunal chairperson put words in the mouths of the Bank's witness and the 6th Respondent who are recorded to have admitted to know the 1st Respondent as the wife of the 2nd Respondent in their testimony; something which was never uttered during the hearing at the District Land Housing and Tribunal. The learned advocate explained to this court what in his view the said witnesses told the Tribunal. And pointed out that on page 10 of the typed judgment the Chairperson wrote:

> *'SU2 alitambua kwamba SM1 ni mke wa mteja wao aliyedhamini mkopo wa wadaiwa ...' (unofficial translation: SU2 acknowledged that SM1 is the wife of their client who guaranteed a loan for ....).*

Then went on to erroneously conclude that Harriet Haule was the wife of the 2nd Respondent. It is the same situation for the 6th Respondent who is also said to have acknowledged and recognize the 1st Respondent as the wife of the 2nd Respondent. According to the learned counsel the record does not

show either of the two witnesses acknowledged knowing the 1st Respondent at any point during hearing; thus, he misdirected himself and a result erroneously concluded. Harriet Haule is not known by those witnesses nor her record with the bank as the guarantor's wife since Andekirwa Amani Minja had submitted to the bank an Affidavit that he was single and not married.

On the second ground, the learned advocate for the 1st Respondent submitted that it was not true that the Chairperson was incorrect in recording and considering the testimonies and evidence of each side. There weren't any additions as averred by the Appellant's advocate.

Our perusal of the record shows that the 6th Respondent is recorded to have admitted to know Andekirwa Amani Minja who was their neighbour. As for the Bank's witness, SU2 perusal of the record shows that in the handwritten proceedings the Chairperson recorded the Bank's witness SU2 one Filepedes Rutashubangwa Felix to have said:

> *'Suala lipo Mahakamani kwa kuwa bank tumeshtakiwa. Anaye dai ni mke wa mteja wetu ambaye alidhamini kwa nyumba na walichukua mkopo walishindwa kurejesha wote' (unofficial translation: This matter is in court*

because we (the bank) have been sued. The Applicant is the wife of our client who put up a house as a guarantee for a loan. They defaulted.)

This was in response to a clarification question from one of the assessors. The only other time he made reference to the 1st Respondent was in passing, stating he did not remember whether in their records (the Bank's) there was there was spousal consent or an Affidavit and later he stated that the 2nd Respondent was not married. It should be noted that there is neither an Affidavit nor any other document produced by the Appellant's to prove that Andekirwa Amani Minja had in fact submitted an Affidavit that he was single or a spousal consent. In our view, as already stated elsewhere in this judgment the Appellant's would have helped their arguments greatly if such documents were actually tendered.

From the above analysis, I am aware that the 1st Respondent produced a marriage certificate to that she is married to Philmin Minja alleging that he is also Andekirwa Amani Minja. Additionally, she has since become the co-administrator of the of the 2nd Respondent's estate with Ruachi Minja who is appearing as 6th Respondent as the 1st administrator of the estate of Andekirwa Minja. The Appellants despite disputing all of this produced

nothing other than averments that the two names are not of same person, they are of two different men. Other than a loan payment schedule they produced nothing for the tribunal to work on and verify in terms of documentation.

As I end let me take the liberty of quoting a clarion call made in **International Commercial Bank Limited vs. Marry Anna Lyimo and another***(supra)* which was interestingly, brought to the attention of this court by the Appellant's learned advocate where by Mgeyekwa J., had this to say:

> *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 original marriage certificate of right 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. (Emphasis supplied)

Had the Appellant done as they were required by the law, they would not be in the position they are sitting right now.

In the event, I am satisfied that the trial Chairperson properly analyzed the evidence availed before the Tribunal and reached an appropriate conclusion hence there is no justification to interfere with the said decision. Appeal is dismissed with costs. Order accordingly.

THE HIGH COURT OF TANZANIA
LAND DIVISION

A.A. OMARI
JUDGE
03/10/2022

Judgment pronounced and dated 3rd day of October, 2022 in the presence of learned counsels for the Appellant and 1st Respondent and in the presence of the 2nd and 6th Respondents. Right to appeal explained.

THE HIGH COURT OF TANZANIA
LAND DIVISION

A.A. OMARI
JUDGE
03/10/2022