

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

LAND APPEAL NO.111 OF 2021

(Originating from Ilala District Land and Housing Tribunal in Land Application No.235 of 2014)

PAULO RWEYEMAMU.....APPELLANT

VERSUS

**AKIBA COMMERCIAL BANK.....1ST RESPONDENT
PATRICK ELIAS NYATO.....2ND RESPONDENT**

Date of Last Order: 10.10.2022

Date of Judgment: 28.11.2022

JUDGMENT

V.L. MAKANI, J

This is an appeal by PAULO RWEYEMAMU. He is appealing against the decision of Ilala District Land and Housing Tribunal (the **Tribunal**) in Land Application No.235 of 2014 (Hon. J.M. Bigambo, Chairman).

At the Tribunal the 1st respondent, Akiba Commercial Bank (the **Bank**) were ordered to give the appellant and the 2nd respondent 60 days' notice to pay the loan. The Bank's counterclaim was dismissed, and each party was ordered to bear his own costs.

Being dissatisfied with the decision of the Tribunal the appellant has filed this appeal with three grounds as follows:

- 1. That the Chairman erred in law and in fact by failure to put into consideration the fact that the Application never guaranteed the last loan for the 2nd respondent and the same was never consented by th applicant's wife.*
- 2. That the Chairman erred in law and in fact for failure to put into consideration of the **Exhibit P1** tendered by the appellant in respect of the last loan to have not been guaranteed by the appellant.*
- 3. That the Chairman erred in law and in fact by failure to take note of the loan agreement and considering the letters purported to be dated 11th April, 2014 and letter dated 22nd April 2014 as the consent and mortgage to guarantee the purported loan.*

The appellant prayed for the appeal to be allowed and judgment and order of the Tribunal to be set aside.

The appeal proceeded orally and Mr. Ndibalema appeared for the appellant. He argued the first and second grounds of appeal together and the third ground separately.

As for the first ground Mr. Ndibalema submitted that the Chairperson failed to consider that the appellant never guaranteed the last loan of

TZS 5,000,000/= which was granted to the 2nd respondent in 22/04/2014. He said it is not disputed that the appellant and the 2nd respondent know each other and further it is not disputed that they had guaranteed a different loan facility that was granted to the 2nd respondent this was about three times on different amounts. He said the appellant did not guarantee the loan of TZS 5,000,000/= which was the last loan, and the loan was never consented by the appellant's wife (**PW2**) who testified at the Tribunal. Mr. Ndibalema said though the Chairperson observed this, but she proceeded to consider the letters which were dated 11/04/2014 (**Exhibit D1**) as spousal consent which is contrary to the law. He further pointed out that failure to have a spouse consent on the grant of the loan by mortgaging the matrimonial home is illegal and the Mortgage Deed between the 1st and 2nd respondents is null and void. He relied on the case of **NBC Limited vs. Nurbano Abdallah Mulla, Civil Application No. 207/12 of 2020 (CAT-Tanga)** (unreported) which insisted that failure to obtain consent from the respondent for the second overdraft facility was in contravention of the mandatory requirement under section 114 of the Land Act. Since there was no consent from the appellant wife in respect of the last loan this means the Mortgage Deed created between the 1st and 2nd respondent was

null and void. There is another case of **Samwel Olung'a Igogo & 2 Others vs. Social Action Trust Fund & Others, Commercial Case No. 3 of 2004 (HC-Commercial Division) (unreported); [2005] TLR 343** which stated that a 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 asserted by the spouse of the borrower living in the matrimonial home. Mr. Ndibalema submitted that the Mortgage Deed created by the 1st and 2nd respondents is invalid as they lack spouse consent. He said this was not observed by the Chairperson hence arriving a wrong decision.

Mr. Ndibalema also said the Chairperson failed to consider **Exhibit P1** which was an affidavit of the 2nd respondent sworn after the appellant had discovered that the 2nd respondent never consulted him and his wife when he obtained the last loan of TZS 5,000,000/= granted on 22/04/2015. He said **Exhibit P1** was clear evidence from the 2nd respondent that he did not involve the appellant and his wife when he was acquiring the last loan. he said this ought to have been considered by the Chairperson as evidence clearly sworn by the 2nd respondent who never appeared at the Tribunal or this court. He said

with these explanations the two grounds be allowed and the decision of the Tribunal be set aside.

As for the third ground, Mr. Ndibalema said the letters dated 11/04/2014 and 22/04/2014 are not spouse consent. He said the Bank require proper documentation not mere letters from the borrower or guarantors. There are specific forms to be filled by the borrower and guarantor of the loan and further the spouse and all must be witnessed by Commissioner for Oaths. He said the Chairperson treated the letters as spouse consent and Mortgage Deed. He said the letters were not written by the appellant's wife and they had no connection with the consent by the appellant's wife. Therefore, the Tribunal's decision was unjust and in contravention of natural justice. He relied on the case of **Mbeya Rukwa Autoparts & Transport Ltd vs. Jestina George Mwakyoma [2003] TLR 251** which stated that a decision reached without regard to natural justice or in contravention of the Constitution is void and of no effect. He said looking at the decision of the Tribunal there was no proof of consent by the appellant's wife on the last loan of TZS 5,000,000/=. Further there is no evidence of the Mortgage Deed being signed by the appellant to mortgage their matrimonial house in Gongo la Mboto

Mwisho wa Lami in respect of the loan granted to the 2nd respondent on 22/04/2014. Mr. Ndibalema said who alleges must prove so it was the duty of the Bank to prove that there was a Mortgage Deed duly signed by the appellant and spouse consent by the appellant's wife. But none of these were tendered before the court. He prayed for the appeal to be allowed and the decision of the Tribunal be quashed and set aside.

In reply Mr. Wasonga drew the court's attention to page 4 of the Judgment of the Tribunal where the issues were framed, and he said the issue of spouse consent was not one of them. He said the issues were whether the appellant guaranteed the loan; and whether the 2nd respondent defaulted in the repayment of the loan, and whether there was enough notice of default to the appellant. The last issue was reliefs. He said the issue of spousal consent is an afterthought as Counsel was supposed to confine himself on the issues raised at the Tribunal. He said alternatively, even if the court would take the issue of spouse consent as an issue still it did not hold water because the spouse is the one who is supposed to make the claim that she did not give any consent.

He said in terms of section 114(2) of the Land Act the appellant as a Mortgagor was duty bound to notify Bank that he has a spouse or otherwise not as the case may be. So he said , according to the said provision the mortgagor (the appellant) is supposed to disclose if he has a spouse or not. The duty of the mortgagee (the **Bank**) is to make efforts to know whether or not the mortgagor has a spouse. He said but the main duty lies with the mortgagor who in the present instance is the appellant (section 143(3) of the Land Act).

Mr. Wasonga said under section 114 (1)(b) of the Land Act provides that any document or form used to grant the mortgage and is signed/or there is evidence that it has been assented by the mortgagor or spouse living in the matrimonial home is fine. The emphasis is that any document can be used as long as the mortgagor and spouse have signed and assented to the creation of the mortgage.

Mr. Wasonga said looking at the letters in **Exhibit D1** they show that they were signed by the spouse. He said the case of **NBC vs. Nurbano Abdallah Mulla** (supra) is not relevant because consent was not the issue. He said even if consent was to be used as an issue,

the property in this present case is not a matrimonial home. He said consent is only for matrimonial home and he relied on the case of **NBC vs. Nurbano Abdallah Mulla, Civil Appeal No. 283 of 2017 (CAT-Tanga)** (unreported) where a matrimonial home was defined. But he went on to say that at the trial it was never established that the suit property was a matrimonial home. He said this argument is the same in respect of the case of **Samwel Olung'a Igogo** (supra) as consent was not an issue. He said it was submitted that **Exhibit P1** was proof of consent, but he said that **Exhibit P1** was not proof that the appellant did not guarantee the loan.

As for the last ground that **Exhibit D1** were mere letter, Mr. Wasonga continued his reliance on section 114 of the Land Act that there is no standard format as regards to spouse consent. On the basis of what he submitted he prayed for the appeal to be dismissed with costs.

Mr. Ndibalema reiterated what was submitted in the main submissions and emphasized that the issue of consent cannot be put aside as the letters were concluded as consent. He said the Bank was aware that the property that was mortgaged to guarantee the previous loans was a matrimonial home. As for section 114(1)(b) of the Land Act that any

form can be used as consent, Mr. Ndibalema said it should be noted that the appellant and his wife were not mortgagors in all the loan facilities but were guarantors and the issue in dispute is that they did not guarantee the last loan of TZS 5,000,000/=. He reiterated that the letters as **Exhibit D1** were mere letters, had no photos and they were not attested to make them authentic. As for the case of **NBC Limited vs. Nurbano Abdallah Mulla** (supra) (judgment), consent is mandatory for extension or variation of the loan. He stressed that the last loan was not consented or guaranteed by the appellant and his wife. He prayed for the appeal to be allowed.

I have listened to submission by the learned advocates. The main issue for consideration is whether the appeal has merit. And in so doing I will be guided by the principle that this being the first appellate court it is entitled to re-valuate the evidence on record by reading it and subject to scrutiny and make a decision (see **Jamal Tamim vs Felix Mkosamali & Another, Civil Appeal No. 110 of 2012 (CAT-Tabora)** (unreported)).

I will consider the grounds of appeal together as they all revolve around the issue of evidence.

There is no dispute that the appellant had four times guaranteed the loan taken by the 2nd respondent. In all these instances the 2nd respondent repaid the loan to the Bank and hence there was no default. The appellant is complaining that the last loan taken by the 2nd respondent in respect of TZS 5,000,000/= was never guaranteed by him and he said the 2nd respondent admitted to this vide Exhibit P1 which the Tribunal's Chairperson did not consider at all.

I have gone through the evidence on record. Indeed, there is no proof that there was a loan taken by the 2nd respondent and that the appellant was the guarantor. There is no Mortgage Deed by the Bank or any form of guarantee and spousal consent. **Exhibit D1** "*Mkataba wa Mkopo na Dhamana*" (Loan Agreement and Guarantee) reflects that the appellant was the borrower which is contrary to the evidence by the Bank that the 2nd defendant was the borrower and the appellant the guarantor. Even **Exhibit D1** itself is questionable as there is no seal of the Bank, the property which is security is not properly described as there is no House Number and it generally states the house is in Gongo la Mbotu karibu na Guluka Kwalala. I am sure in that area there are many houses. The attestation clauses are

all not complete they do not show if the alleged borrower is known to the magistrate or has been identified to him/her. On the part of the Bank's attestation there is no date. With these weaknesses the said **Exhibit D1** cannot, in my view, stand as a Loan Agreement, Mortgage Deed or Guarantee. In any case, the appellant is not the borrower and so the said Loan Agreement (**Exhibit D1**) does not reflect who is the actual borrower and guarantor in the loan of TZS 5,000,000/= which was actually taken by the 2nd respondent.

I agree that the issues that were drawn at the Tribunal were not on spouse consent but one cannot escape the issue of spouse consent as it touches on a Loan Agreement. And indeed, according to section 114 of the Land Act the mortgagor has to state whether he has a spouse, and the Bank is supposed to verify. But in this instance, it is not stated if the Bank verified the signature of the spouse appearing in the alleged **Exhibit D1**. Mr. Wasonga said under section 114 of the Land Act provides that any document or form can be used to grant the mortgage if it is signed/or there is evidence that it has been assented by the mortgagor or spouse living in the matrimonial home. But with due respect, if a Bank of such reputation as the 1st respondent accepts such flimsy documentation as is the case with

Exhibit D1 for issuance of loans, then it should expect massive default in recovery of loans. And I am sure, Mr. Wasonga did not mean what he said as Banks have standard forms applicable in their branches when it comes to loan documentation, and in most instances the Bank's letterhead and seal is used. The statement that any document can be used shows laxity of the Bank and lowering its status. In the circumstances, **Exhibit D1** raises a lot of questions, and it is actually doubtful. In that respect I don't agree with the Chairman's conclusion that the appellant guaranteed the loan as the standard of proof as established hereinabove leans in favour of the appellant.

In the result, I find the appeal to have merit and it is hereby allowed with costs. The judgment and decree of the Tribunal is quashed and set aside.

It is so ordered.



V.L. MAKANI
JUDGE
28/11/2022