

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

LAND APPEAL NO 263 of 2023

(Appel from judgment and decree in Land Application No. 279 of 2015 dated 02/06/2023 by Hon. R. Mbilinyi Chairperson at Kinondoni District Land and Housing Tribunal)

SAID HASSAN MALANDA 1ST APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK 1ST RESPONDENT

NUTMEG AUCTIONEERS &

PROPERTY MANAGERS CO. LTD 2ND RESPONDENT

**JEREMIAH GEOFFREY MWANJOKA (AS Administrator of the
Estate of the late JOYCE SICHOME MWANJOKA) 3RD RESPONDENT**

ESTER PETER MINGA 4TH RESPONDENT

Date of last Order: 20/12/2023

Date of Judgment: 05/02/2024

JUDGMENT

I. ARUFANI, J

The appellant named hereinabove being aggrieved by the judgment and decree of Kinondoni District Land and Housing Tribunal (henceforth, the tribunal) delivered in Land Application No. 279 of 2023 dated 02nd day of June 2023, appealed to this court against the whole decision of the tribunal basing on the following grounds: -

- 1. That the honourable trial chairperson erred in law and fact in holding that the 4th respondent is the sole owner*

of the suit house and that is why there was no spouse consent from the applicant/appellant.

2. *That the honourable trial chairperson erred both in law and fact in holding that the applicant had not adduced evidence to prove that he has interest over the suit house as he adduced a marriage certificate bearing the name of **Shani Peter Minga** and not **Ester Peter Minga** (4th respondent).*

While the appellant was represented in the matter by Mr. Alexandar Kyaruzi, learned advocate, the first respondent was represented by Mr. Selemani Ally Kimaro, learned advocate, third respondent was represented by Mr. Subby Nzowa, learned advocate and the fourth respondent appeared in the court in persons. Hearing of the appeal proceeded ex parte against the second respondent after seeing she was duly served by way of publication but failed to appear in the court. The appeal was heard by way of written submissions.

The brief background of the matter is to the effect that, sometime in 2013 the fourth respondent obtained a loan of TZS 20,000,000/= from the first respondent and mortgaged the house located at King'ong'o, Kimara, Kinondoni, Dar es Salaam as a security for the stated loan (henceforth, the suit premises). After the fourth respondent defaulted to repay the loan the first respondent appointed

the second respondent to auction the suit premises as a measure of recovering the outstanding loan. The suit premises was auctioned by the second respondent and sold to the third respondent who emerged the highest bidder in the auction.

The appellant who said he is the spouse of the fourth respondent was not aware of the stated loan and auction. He said after being informed the suit premises had been sold by auction, he filed Land Application No. 279 of 2015 at the tribunal seeking for declaratory order that the sale of the suit premises by auction was void as it was mortgaged without his consent as the spouse of the fourth respondent. After hearing the evidence from the parties, the tribunal dismissed the application for being devoid of merit. The appellant was aggrieved by the judgment and decree of the tribunal and appealed to this court basing on the above stated grounds.

The counsel for the appellant stated in relation to the first ground of appeal that, as the appellant was the husband of the fourth respondent, the fourth respondent was legally bound to seek for his consent as a spouse before mortgaging their matrimonial home. He argued that, failure to seek for consent of the appellant as her spouse renders the mortgage null and void. He supported his submission with

the case of **Samwel Olunga Igogo & Two Others V. Social Action Trust Fund & Others**, [2005] TLR 343.

He submitted that the Chairperson of the tribunal erred in holding the fourth respondent had no spouse that is why she didn't seek for spouse consent while there was oral evidence showing the appellant lives in the suit premises with the fourth respondent as their matrimonial home. He stated the marriage certificate was adduced in the matter to prove the fourth respondent had a husband who is the appellant. He stated the appellant called PW2 who testified he is a Muslim Sheikh and is the one solemnized the marriage of the appellant and the fourth respondent and issued them with a marriage certificate.

He argued in relation to the second ground of appeal that, it was wrong for the tribunal chairperson to disregard the marriage certificate which was tendered and admitted in the case as an exhibit to establish existence of the marriage between the appellant and the fourth respondent. He stated in finding the appellant had not brought evidence to prove he has interest on the suit premises the tribunal chairperson relied on difference of the names of the fourth respondent.

He stated the name of the fourth respondent appears in the marriage certificate as Shani Peter Minga instead of the name of Ester Peter Minga used to purchase the suit property and obtain the loan from the first respondent. He prayed the court to allow the appeal and nullify the sale of the suit premises for lack of spouse consent.

The counsel for the first respondent replied the submission of the counsel for the appellant by stating in relation to the first ground of appeal that, being spouse to the owner of a property does not, on its own, guarantee requirement of his consent over the property. He cited in his submission section 58 of the Law of Marriage Act, Cap 29 R.E 2019 which states inter alia that, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or wife from acquiring, holding and disposing of any property.

She stated from the above cited provision of the law a spouse may own properties on their own regardless of their marriage. She stated the property which requires consent of a spouse is the property which is either a joint property or matrimonial home. She stated there is consent required on private property owned by parties to a marriage. She submitted that, since exhibit D5 shows the suit premises was in the sole name of the fourth respondent and

according to exhibit P1 the suit premises was obtained prior to the marriage alleged was celebrated in 2012, they are subscribing to the holding of the Chairman of the tribunal that, there was no need of a spousal consent from the appellant or any other person to enable the suit premises to be mortgaged as a security for the loan granted to the fourth respondent.

She stated the trial tribunal did not determine whether the fourth respondent had a spouse or not because that was not an issue for determination. She stated the trial tribunal focused on whether the appellant had interest on the suit premises or not. She stated the appellant failed not only to prove his alleged marriage with the fourth respondent but also failed to prove he was living in the suit premises. She stated she is in agreement with tribunal finding that, the appellant did not adduce any evidence of ownership or any interest over the suit premises. She submitted that there is no any cogent evidence to suggest the suit premises was a matrimonial property.

She cited in her submission the case of **The Registered Trustees of St. Anita's Green Land School (T) and six Others V. Azania Bank Limited**, Civil Appeal No. 225 of 2019, CAT at DSM (unreported) where it was stated that, a party who alleged anything in his favour also bears the evidential burden and the standard of

proof is on the balance of probabilities, which means the court will sustain and uphold such evidence which is more credible compared to the other on a particular fact to be proved.

She stated exhibits D6 and D9 shows the suit premises pledged to secure the loan was a private property of the fourth respondent and the stated evidence is supported by the affidavit sworn by the fourth respondent which states the fourth respondent is the sole owner of the suit premises, the property was in the name of the fourth respondent and the property was not matrimonial home. She cited in her submission the case of **Hadija Issa Arerary V. Tanzania Postal Bank**, Civil Appeal No. 135 of 2017, CAT at Iringa (unreported) where it was stated that, as the mortgagor provided an affidavit proving that he was single, the mortgagee had no reason to disbelieve him. She based on the above stated position of the law to submit that the tribunal was correct in finding the fourth respondent was the sole owner of the suit premises and the mortgage was valid and there was no need of spouse consent.

She argued in relation to the second ground of appeal that, although the appellant has alleged the fourth respondent changed her name to Shani in 2012 but he opted to sue her under the name of Ester. She said under the principle of estoppel provided under

section 123 of the Evidence Act, the appellant is estopped to change the name of his wife without following the require procedure of changing a name. He stated the tribunal was justified to find in the absence of deed poll, Esther and Shani are two distinct individuals and so is the alleged marriage.

She stated in the transaction in respect of the mortgage and the related documentation the fourth respondent has been using the name of Esther and there is nowhere in her testimony the fourth respondent has mentioned changes of her name. She stated further that, the fourth respondent did not testify anything to corroborated the tendered marriage certificate and the difference in her name. She submitted the tribunal was right to deny the alleged change of name. She submitted the appellant is a stranger to the suit premises which was rightly mortgaged by the rightful owner and later on, rightfully sold by the first respondent. She prayed the appeal be dismissed with costs for want of merit.

On his side the counsel for the third respondent stated in relation to the first ground of appeal that, the same is without merit at all as the admission by the fourth respondent in her affidavit about her marital status and the form for creation of mortgage deed signed by the fourth respondent shows the fourth respondent has never been

in marriage. As for the second ground of appeal he stated the same is baseless because while the certificate of marriage tendered before the tribunal as evidence of marriage between the appellant and the fourth respondent was issued for the appellant and Shani Peter Minga the pleading shows the fourth respondent is Ester Peter Minga. He stated that, technically shows they are two distinct persons. At the end he prayed the appeal be dismissed with costs and confirm the decision of the trial tribunal.

In his rejoinder the counsel for the appellant maintained the suit premises is a matrimonial asset between the appellant and the fourth respondent. He stated the evidence adduced before the tribunal was about a bare land and not the house which was pledged as the security for the loan granted to the fourth respondent. He stated even if the land was bought by the fourth respondent but the house was built jointly by the appellant and the fourth respondent during subsistence of their marriage. He stated that shows the suit premises is not a private property of the fourth respondent and section 58 of the Marriage Act cited by the counsel for the first respondent is inapplicable in our case.

He argued the affidavit sworn by the fourth respondent to show she was not married left a lot to be desired. He said the fourth

respondent might have lied to obtain the loan from the first respondent. He said the first respondent was duty bound to make further investigation before neighbours or the leaders of the local Government are about marital status of the fourth respondent. He submitted that, apart from the affidavit sworn by the fourth respondent there was no any other evidence to show the fourth respondent is a sole owner of the suit premises.

He stated in relation to the second ground of appeal that, since existence of marriage was proved, then the difference of the names of Shani and Ester could have not been a consideration to ignore the marriage certificate. He stated the Sheikh who solemnized the marriage of the appellant and the fourth respondent appeared before the tribunal to testify to the stated effect. He submitted there was no any reason that was given by the chairperson of the tribunal for disbelieving the stated witness and ignore his testimony. He said the marriage was contracted in 2012 and the loan was taken in 2013 meaning that the respondent concealed the truth that she was married. At the end she prayed the appeal be allowed with costs.

I have carefully considered the rival submissions filed in the court by the counsel for the appellant and the reply made thereof by the counsel for the first and third respondents. The court has also gone through the

record of the matter and find the issue to determine in this appeal is whether the appeal has merit and deserve to be allowed. In determination of the stated issue, I have found in order to be able to determine the first ground of appeal properly it is apposite to start with the second ground of appeal and thereafter I will revert to the first ground of appeal.

The second ground of appeal states the tribunal erred in holding the appellant had not adduced evidence to prove he has interest over the suit premises as he adduced a certificate of marriage bearing the name of Shani Peter Minga and not Ester Peter Minga who is the fourth respondent in the present appeal. After going through the judgment of the tribunal the court has found it is true that the tribunal found the appellant had failed to prove he has interest over the suit property as the certificate of marriage he adduced before the tribunal as exhibit P1 shows he contracted Islamic Marriage with Shani Peter Minga and not Ester Peter Minga who borrowed the money from the first respondent and pledged the suit premises as a security for the loan granted to her.

The court has found the appellant said the fourth respondent is his wife and they started living together from the year 2007 and they contracted their Islamic Marriage in 2012. The appellant said that, before entering into their marriage the name of the fourth respondent was Ester Peter Minga but later on, she changed her name into Shani Peter Minga.

Although the stated evidence of the appellant was supported by the evidence of the fourth respondent and the evidence of Omari Mhidini Omari (PW2) who said he is the Sheikh solemnized the marriage alleged was contracted by the appellant and the fourth respondent but the court has failed to see cogent reason of faulting the finding of the Chairperson of the tribunal.

The court has come to the above finding after seen that, as rightly stated by the Chairperson of the tribunal and argued by the counsel for the first respondent, the said certificate of marriage did not manage to establish the appellant is the spouse of the fourth respondent. That is because the certificate admitted in the case as exhibit P1 shows the marriage was solemnized between the appellant, Said Hassan Malanda and Shani Peter Minga and not between Said Hassan Malanda and Ester Peter Minga.

Although the appellant called Omari Mhidini Omari who testified before the tribunal as PW2 and said he is the Sheikh solemnized the marriage of the appellant and the fourth respondent, but as rightly stated by the Chairperson of the tribunal and argued by the counsel for the first respondent in her submission the court has found for the purpose of this matter there is no other evidence adduced before the tribunal to establish the appellant entered into marriage with the fourth respondent. The court

has found there is no relative, neighbour or even a local area leader was called to prove the appellant is the spouse of the fourth respondent or they have lived together as husband and wife for the period they stated they have been living together as such.

The court has found that, even if it would have been accepted that the fourth respondent changed her name from Ester to Shani after entering into the alleged marriage with the appellant as stated by the appellant, PW2 and the fourth respondent, but it was not stated why the fourth respondent continued to use the name of Ester in borrowing the money from the first respondent instead of using the new name of Shani she acquired after entering into the alleged marriage and changed her faith.

The court has found as rightly argued by the counsel for the first respondent even the appellant sued the fourth respondent in the matter by using the name of Ester instead of the alleged name of Shani. In addition to that, the court has found even when the fourth respondent was giving her testimony before the tribunal, she introduced herself by using the name of Ester and not the alleged new name of Shani. The court has found when the Court of Appeal was dealing with the issue of a person to be referred in different names in the case of **Adamu Wamuza** (As Administrator of the Estate of the late **Paul James**) **V. Kinondoni**

Municipality & Another, Civil Appeal No. 424 of 2020, CAT at DSM (unreported) it stated as follows: -

"The law stresses the need for a stable and coherent use of names to avoid any danger of confusion as to identity or lineage. The aim of preventing confusion over identity of names is no doubt, a legitimate one. It is desirable to avoid confusion both in relations among individuals and the authorities and in relations among individuals. Unregulated change of name might offer opportunities for criminal or dishonest behaviour."

If the fourth respondent found it was prudent to use the old name of Ester instead of the alleged new name of Shani in borrowing the money from the first respondent because of whatever reason, she was required to add the new name of Shani in the said transaction as alias or indicated she is also known by the name of Shani. The record of the tribunal shows that was not done and in lieu thereof, the court has found the fourth respondent swore an affidavit admitted in the case as exhibit D5 and deposed therein that, she is not married and she is not living with any man.

Under that circumstances the court has found there is nothing tangible which has managed to establish the Chairperson of the tribunal erred in holding the certificate of marriage bearing the name of Shani Peter Minga instead of Ester Peter Minga (fourth respondent) adduced in the case at the tribunal proved the appellant has interest over the suit

premises. In other word the appellant failed to discharge his duty of proving the stated allegation. Consequently, the court has found the second ground of appeal is devoid of merit and cannot be allowed.

Back to the first ground of appeal the court has found the appellant is stating the Chairman of the tribunal erred in holding the fourth respondent is the sole owner of the suit premises. That being the argument of the appellant the court has found its duty is to determine whether the Chairperson of the tribunal was right or erred in arriving to the stated holding. The court has found the evidence adduced before the tribunal shows the fourth respondent pledged the suit premises as a security for the loan of Tshs. 20,000,000/= she obtained from the first respondent.

The court has found when the fourth respondent was pledging the suit property as a security for the stated loan, she assured the first respondent she was the sole owner of the suit premises by producing to the first respondent the sale agreement of buying the land where the house in dispute is built and swore an affidavit to assure the first respondent, she was the sole owner of the suit premises. The stated sale agreement and the affidavit presented to the first respondent by the fourth respondent were admitted in the matter by the tribunal as exhibits D6 and D9.

The argument by the appellant and his counsel is that, the appellant who is the husband of the fourth respondent was not involved in the transaction of mortgaging the suit premises which they use as their matrimonial home as a security for the loan granted to the fourth respondent and his consent for the said matrimonial home to be used as a security for the loan given to the fourth respondent was not sought and obtained. The court has found it is provided under section 59 (1) of the Law of Marriage Act, Cap 29 R.E 2019 as follows: -

*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. [Emphasis added].*

The requirement to obtain consent of the other spouse before alienating a matrimonial home by way of mortgaging the same or otherwise is also provided under section 114 (1) of the Land Act, Cap 113 R.E 2019. The afore cited provision of the law states that, a mortgage of a matrimonial home shall be valid only if any document or form used to apply for the same is signed or assented by the mortgagor and his or her spouse. The position of the law as provided under section 114 (2) of the

Land Act states that, it shall be the responsibility of a mortgagor to disclose that he or she 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.

Although the court is in agreement with the counsel for the appellant that the respondent as a mortgagee had responsibility of verifying the fourth respondent had a spouse or not for the purpose of seeking for his consent but section 114 (3) of the same law states that, a mortgagee shall be deemed to have discharged the responsibility of 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 was a spouse or any other third party holding interest in the mortgaged land.

The court has found the evidence adduced before the tribunal shows the appellant declared through the affidavit, she handed to the first respondent together with the sale agreement of the land in dispute that she was the sole owner of the suit premises. The court has also found that, although after the fourth respondent swore an affidavit to establish that she had no spouse, then under the wording of section 114 (3) of the Land Act the first respondent had no legal obligation of ascertaining

marital status of the fourth respondent but the court has found DW2 said they made an inquiry of the marital status of the fourth respondent from her neighbours and her local area leader and they were informed she was not married.

The court has found that, even if it would have been established the appellant was the husband of the fourth respondent who has a registerable interest in the suit premises but his interested had not been registered as required by section 59 (1) of the Marriage Act which requires the stated interest to be protected by caveat, caution or otherwise. The requirement for a spouse to protect his registerable interest over the matrimonial home was insisted in the case of **Mwakalindile V. NBC Holding Corporation**, [2001] 1 EA 143 where it was stated by the Court of Appeal of Tanzania that: -

"Under the Law of Marriage Act, a spouse had a registrable interest in the matrimonial home. In this instance, the appellant had not registered her interest. There was therefore no way the first respondent could have known of her interest considering that the house was in the name of the husband. Under such circumstances, the mortgage of the house was not null and void."

The court has found as there was no interested over the suit premises which had been registered by the appellant, there is no way it can be said the first respondent would have known the appellant had interest over the

suit premises which the fourth respondent had declared she is the sole owner. The court has considered the argument by the counsel for the appellant that, the appellant stated in his evidence that he started living with the fourth respondent from 2007; that they bought the suit land in 2008 and entered into their Islamic marriage in 2012 and that shows the appellant contributed in the acquisition of the suit premises.

The court has found the argument by the appellant that he gave the fourth respondent money of buying the land where the house is built and the money of building the suit premises but there is no any evidence adduced before the tribunal by the appellant to support his evidence. The court has also been of the view that, even if it would be accepted the suit premises was acquired when the appellant and the fourth respondent were living together but it is not enough to establish the suit premises is not a sole property of the fourth respondent. The court has come to the stated view after seeing section 60 (a) of the Law of Marriage Act states categorically that: -

"Where during the subsistence of a marriage, any property is acquired-

(a) 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".

While being guided by the position of the law stated hereinabove the court has come to the settled view that, the evidence adduced before the tribunal established the suit land was bought and registered in the sole name of the fourth respondent, the fourth respondent swore an affidavit showing she was the sole owner of the suit property and there is no caveat or caution registered by the appellant to establish he had interest over the suit premises.

The stated finding moved the court to the settled conclusion that, there is nothing establishing the tribunal chairperson erred in holding the fourth respondent was the sole owner of the suit premises and there was no legal requirement for the consent of the appellant to be obtained before the fourth respondent mortgaged the suit premises as the security of the loan granted to her by the first respondent. In the premises the court has found the first ground of appeal is equally devoid of merit.

In conclusion, the court has found the grounds of appeal filed in this court by the appellant and the submissions made thereof have not managed to convince the court the Chairperson of the tribunal erred in arriving to the holding impugned in the grounds of appeal filed in this court by the appellant. In the upshot the appeal is hereby dismissed in its entirety for being devoid of merit. The court is

ordering each party to bear his or her own costs in this appeal. It is so ordered.

Dated at Dar es Salaam this 05th day of February, 2024




I. Arufani
Judge
05/02/2024

Court:

Judgment delivered today 05th day of February, 2024 in the presence of Mr. Subby Nzowa, learned advocate for the third respondent and also holding brief for Mr. Alexander Kyaruzi, learned advocate for the appellant, in the presence of Ms. Yunis Msami, learned advocate for the first respondent, in the absence of the second respondent and in the presence of the fourth respondent in person. Right of appeal to the Court of Appeal is fully explained.




I. Arufani
Judge
05/02/2024