IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 67 OF 2000

JOYCE BEDA MPINDA ..... APPLICANT/OBJECTOR

VERSUS

CRDB BANK LTD. ..... 1ST RESPONDENT/DECREE HOLDER
GWALUGANO OBASI MWASABWITE .....2ND SECOND RESPONDENT
ERIC AUCTION MART & COURT BROKER ..... 3RD RESPONDENT

Counsel: Mr. Mbamba for Applicant/Objector
Mr. Mwakipesile for first Respondent/Decree Holder

RULING

Dr. BWANA, J:

The Applicant/Objector filed this application on 24 August 2001 requesting this Court to grant the following orders –

1. Postpone the sale of the following properties – Plot. No. 304 Block G with CT No.34098 situate at Mbagala; and Plot No. 738 Block , CT. No. 47239 at Kijitonyama in Dar es Salaam pending the hearing and determination of this application.

2. The Court investigate the objection that the said two properties which are registered in the name of the second respondent are not liable for attachment and sale – they are matrimonial properties.

3. The warrant of attachment/sale be lifted.

4. Costs of this application.

The following facts are not in dispute. The Applicant/Objector is the wife of the second respondent. The two houses that are up for sale are and were solely registered in the name of the second respondent. The said second respondent failed to honour the terms of the Overdraft Agreement and as consequence thereof the first respondent filed a case at

this Court on 2nd November 2000. He admitted liability. In terms of Order XII R.4 of the CPC, judgment on admission was entered in favour of the decree holder in the sum of shs. 63,357,241/13 together with an interest at 21% per annum. Costs were also awarded to the decree holder. The judgment debtor (second respondent) was ordered to pay the same in six equal monthly instalments beginning 15th January 2001. He defaulted and the decree holder applied for execution by attaching and sale of the two mortgaged properties. The process was put in motion and a proclamation of sale advertised in the newspapers. The sale was to take place on 9th September 2001. This application was filed therefore 16 days before the intended sale. In the interest of justice and considering all factors involved, this Court on 6 September 2001, agreed and ordered the sale of the said properties to be postponed. Then both Counsel filed Written Submissions in support of their averments. The foregoing, as stated, is uncontroverted.

In the Affidavit in support of her application/objection Mrs. Mpinda raises the following key points:-

1. That the said houses are registered in the name of her husband.
2. That the above houses are matrimonial property in one of which the applicant and the 2nd respondent and their family reside (emphasis mine).
3. That the 2nd respondent entered the mortgage deal without her prior knowledge. She became aware of the same only after seeing the advertisement for sale.

The above key points undoubtedly also form the basis of Mr. Mbamba's submission wherein he relies on the provisions of section 59(1) of the Law of Marriage Act and Section 48 (1) (e) of the CPC. All the foregoing views are countered by Mr. Mwakipesile. In the course of writing this Ruling, the Registry of this court received a letter from the Applicant where she requests me to disqualify from hearing Commercial Case No. 67/2000 – the instant one. Let me note here that I am not hearing that case now. It was heard and already determined. What I do now is this application of hers. Be that as it may, she raises the following two grounds and I quote them en extenso:

> *"(1) When the case came up for mention on 7 September 2001 you advised my husband to continue paying the debt for the reason that no Court could accept my application. It was understood that the decision, has been made even before hearing my application.*
>
> *(2) Court brokers have continued to harass me and have kept informing me that they have consulted the judge who has advised them, to continue with the preparation of selling the premises because my application will have to fail.*

That letter came through the normal administrative machinery of this court. It is not supported or accompanied by an affidavit to give those allegations the seriousness they would otherwise deserve. I have considered it and decided to dismiss the said allegations totally. They have no truth, whatsoever. The following are the reasons behind my decision.

1. What I said in passing and in the presence of all the parties was to advise the second respondent to start paying the debt if he has not done so yet. The reason behind this was simple: Whatever the outcome of this application will be, it will never waive the second respondent's liability to repay the loan which he admitted. The longer he takes however, the more burdensome it becomes on him, given the interest and costs involved. To me that was a fair and just advise to the person concerned. It created no impression of bias. The applicant should have been sincere also to note that I did not even know who that respondent was. I had to move my eyes around, calling the name to locate the person.

2. The issue of harassment by Court brokers is absurd to say the least. I do not directly deal with or meet Court brokers in any case, this particular one included. I have not met or do I know him. Further, such an allegation cannot be true because, as stated earlier, I had – on agreement with both Counsel – on 6 September 2001 – entered the following order:

> *"B/C the sale of the said properties hitherto fixed for 9 September 2001 is hereby postponed..."*

No such sale had taken place by the time the Applicant wrote this letter on 14 September. Therefore her claims are baseless to that extent. The parties seem to observe that order. It is important, for record purposes, to remind all involved, the Court of Appeal of Tanzania's stand on this issue of disqualification. In its recent (July 2001) decision in the case of Laurean G. Rugaimukamu vs Inspector General of Police and another (Civil Appeal No. 13 of 1999), the Court (per Ramadhani, J.A) stated at p.4 et seq:

> *"...we think we are duty bound to comment on when a party can ask a judge to disqualify himself or herself from a case... therefore an objection against a judge or a magistrate can legitimately be raised in the following circumstances: One, if there is evidence of bad blood between the litigant and the judge concerned. Two, if the judge has close relationship with the adversary party or one of them. Three, if the judge or a member of his close family has an interest in the outcome of the litigation other than the administration of justice. A judge or magistrate should not be asked to disqualify himself or herself for flimsy or imaginary fears "(emphasis mine)"*

I can say no better than those clearly put/used words of the highest court of the land. Therefore the Applicant's claims contained in her letter, cannot in my opinion, be classfied as being correct, in the extreme acceptance of the words without some risk of terminological inexactitude.

The above said, I will now examine the substance of the Application before me. As stated, both the Applicant and her Counsel tend to base their arguments on the interpretation of Section 59(1) and (2) of the Law of Marriage Act. Indeed the two subsections do protect the interests of a spouse. This principle was expounded further by the Court of Appeal (per Kisanga, J.A) in the case of Mtumwa Rashid vs Abdallah Iddi (Civil Appeal 22 of 1993). Both provisions protect the rights of a spouse where a

matrimonial home is wholly owned by a spouse who intends to alienate it or where it is jointly owned. The Court stated:

> *"This interpretation accords with the stipulation in sub-section 1 that if the matrimonial home is alienated without the consent of the other spouse, then the non consenting spouse shall be deemed to have an interest therein capable of being protected by caveat or caution...in subsection (2) where the matrimonial home is alienated without the consent of the other spouse, then... the purchaser acquires title subject to the right of the non-consenting spouse remaining in the matrimonial home..."(emphasis is mine).*

Some matters need to be clarified in relation to this application. First, the Applicant refers to the two houses as matrimonial property. Section 59 of the Law of Marriage Act speaks of matrimonial home. The two are quite different. She may be excused of that error but I consider the error to be fatal. Section 59 protects the interests of a spouse in a matrimonial home not any matrimonial property. Second, the Applicant does not show which house between the two is used for residential purposes by herself and the family. That is also another fatal omission. For what the law protects is a matrimonial home – which means a home used by husband and wife as their residence. Obviously they do not use both houses for that purpose. Therefore one intending to raise that issue, it is my view, must establish to the satisfaction of the Court that the said property is used as matrimonial home. That is not the case in the present application. Third, is the right of alienation. Section 59(1) speaks of a spouse deemed to have a registrable interest in the matrimonial home. That interest has to be protected by a caveat. That caveat has to be registered with the Registrar of Titles otherwise the mortgagee has no other legal way to know of the same. This seems to be the stand of the Court of Appeal as stated in its recent (April 2001) decision (per Lubuva, J.A) in Idda vs NBC (Civil Appeal No. 59/2000);-

> *"Under this provision, it is beyond dispute that a matrimonial house (home) owned by a wife or husband ought not to be alienated by way of sale, mortgage lease... without the consent of the other spouse... we agree that the*

> *appellant had a regisrable interest in the house which... could be protected by a caveat. The appellant did not register the caveat with the Registrars of Titles. The caveat would serve as a warning to the respondent that the house was a matrimonial property. In the circumstances, there being no caveat to protect the registrable interest of the appellant, there was no way in which the first respondent could know that a house was a matrimonial property (emphasis mine).*

I rely on this view in so far as the instant application is concerned. It has further been held by the High Court (Lugakingira, J as he then was) in the case of Hadija Mnene vs Mbaga and NBC (Civil Appeal No. 40/95) that the provisions of section 59(1) of the Law of Marriage Act 1971, should not be read in isolation:

> *"...but in conjuction with any law for the time being in force relating to the registration of title to land or deeds as therein expressly stated. In accordance with the provisions of section 33(1) (a) of the Land Registration Ordinance, Cap 334, the owner of any estate holds the same free from all estates and interests other than encumbrances registered or entered in the land register. A caveat is an encumbrance to an estate and ought therefore to be registered in order to be operative. A bare interest in an estate would not prevent its alienation where registered land is involved. It is therefore incorrect to think...that the mere existence of s.59(1) is sufficient to prevent an estate from being sold, ... mortgaged..." (emphasis mine)*

Reference has also been made in relation to the provisions of section 48(1) (e) of the CPC. That provision prevents from attachment and sale any residential house or building occupied by a judgment debtor, his wife and dependant children, for residential purpose. First it is already stated herein that the Applicant has not shown between the two houses which one she occupies for residential purposes. Therefore this provision does not protect her application in that respect. Second, where a party voluntarily mortgages to a decreeholder a house which the said party knows and uses as residential, he waives the right accruing under section 48(1) (e). This was clearly stated by Lugakingira, J (as he then was) in the case of Ngeleja vs. NBC (Civil Case No. 154 of 1991, High Court, Mwanza Registry):-

> *"First, there seems to be a misconception as to the operation of section 48(1) (e) of the CPC. True the purpose of the provision is to protect from attachment and sale of residential houses occupied by the judgment debtor, his wife or wives and dependant children... But where the judgment debtor has mortgaged the property, he has thereby waived the benefit of that protection and is estopped from denying the right of the mortgagee to sell the property...whoever wishes s.48(1) (e) to operate in his favour, should not encumber the title to his dwelling, otherwise the provision would have no appliction... therefore the attachment and sale are not vitiated by s.48(1) (e)..." (emphasis mine).*

The foregoing quote is a further amplification of the law as it is in this country and as it is applicable in the instant application.

Therefore all the above views considered, I am satisfied that this Application is devoid of merit. The Applicant's views on the subject matter are both faulty, regrettably inaccurate and seriously wanting in legal objectivity. It must fail. It is thus, dismissed in its entirety with costs.

S. J. Bwana
Judge i/c
24/9/2001