

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

LAND APPEAL NO. 92 OF 2021

*(Originating from the District Land and Housing Tribunal for Mbeya, at Mbeya, in
Application No. 51 of 2019)*

JOHN SOLOMON DAGARAZA.....APPELLANT

VERSUS

1. MACHONJE YUSUPH KIMOSA.....1ST RESPONDENT

2. NMB TUNDUMA BRANCH.....2ND RESPONDENT

JUDGEMENT

Date of last Order: 09.09.2022

Date of Judgment: 30.09.2022

Ebrahim, J.

In this first appeal the appellant is challenging the decision of the District Land and Housing Tribunal for Mbeya (DLHT) in land application No. 51 of 2019. In essence the DLHT dismissed the appellant's claim that the intention of NMB TUNDUMA BRANCH (2nd respondent) to sale the house of Machonje Yusuph Kimosa (the 1st Respondent) was illegal.

The facts of the case can be briefly narrated as follows; the 1st Respondent was advanced a business loan of Tshs. 5,000,000/= (say Five Million Tanzania Shillings) by the 2nd respondent. She (1st

respondent) mortgaged (informal mortgage) the house located at Tunduma Town Council within Momba District. Afterwards, the 1st respondent failed to repay the loan. Therefore, the 2nd respondent made a public announcement to sale the disputed house by auction. It was then that the Appellant (applicant at the DLHT) hurried to the DLHT praying among other reliefs an injunction against the 2nd respondent to sale the house on the claim that; it is a matrimonial home, and the 1st respondent mortgaged the disputed house without his consent as a spouse.

The Appellant told the court that the 1st respondent is his wife. That she was supposed to obtain his consent as per the law before the 2nd respondent could advance the said loan. That, since there was none, the mortgage was unlawful as the result the intended sale of the mortgaged house was illegal. The Appellant stated further that the 1st Respondent forged the sale agreement and other documents to swindle the 2nd Respondent.

The 2nd respondent protested the Appellant's claim. She argued that the 1st Respondent swore an affidavit as to her marital status indicating that she was not married and she was the sole owner of the mortgaged house. The 2nd Respondent contended also that the 1st

Respondent submitted a sale agreement. The 2nd Respondent tendered documentary evidence such as loan agreement, notice of default by the 1st Respondent, affidavits of the 1st Respondent regarding; birth, marital status, ownership of land, and informal mortgage form No. 006.

Upon hearing both parties the DLHT found in favour of the 2nd Respondent. Being dissatisfied by the decision of the District Land and Housing Tribunal, the appellant preferred this appeal raising four grounds of appeal as follows:

- i) That the learned trial Chairman erred in law and fact by deciding the case in favour of the 2nd respondent in a loan without proof of spouse consent as required by law.
- ii) That the learned trial Chairman erred in law and fact by ignoring the evidence adduced by the key witness of the Appellant one Yusufu Kasesele who sold the land in dispute to the Appellant.
- iii) That the learned Chairman erred in law and fact by deciding the case in favour of the 2nd Respondent relying on evidence not qualified by 1st Respondent.
- iv) That the learned trial Chairman erred in law and fact by deciding the case in favour of the 2nd Respondent without the

proof of key witnesses of the Balozi, Afisa mtendaji wa mtaa and Kata who the 2nd Respondent testified to have certified the loan.

The Appellant prayed for this court to allow the appeal, quash and set aside the decision dated 30/09/2021.

The appeal was heard by way of written submissions, parties duly complied to the scheduled order. The Appellant's submissions were drawn by Advocate Gadiel Sindamenya while the Second Respondent was represented by Advocate Baraka Mbwilo. The 1st Respondent did not enter appearance as it was the case before the DLHT.

Supporting the appeal, counsel for the Appellant started by narrating a story of what transpired leading to the instant matter. I find no need to recount the same as it is irrelevant to the determination of the matter. Likewise, the Appellant's counsel has attached documents like a sale agreement between the Appellant and one Yusuph Kasesele, property tax payment receipt and children clinic cards to the written submissions the act that was challenged by the 2nd Respondent's counsel. The 2nd Respondent's counsel submitted that the attaching of documentary evidence to the submission is contrary to the law. According to him the law requires only the attaching of legal authorities.

He relied on the case of **Modestus Rogasian Kiwango vs Hellen Gabriel Minja**, Civil Appeal No. 72 of 2019, High Court of Tanzania at Dar es Salaam (unreported). He prayed for this court to expunge and ignore those attachments.

In his rejoinder, the Appellant defended his action of attaching documents at the appellate stage on the account that the Appellant is the lay person and was not represented before the DLHT hence did not know how to tender them. He is now allowed to do so at this stage. According to the Appellant's counsel attaching the evidence at appellate stage helps this court to understand the situation at the DLHT and that the same did not occasion any injustice to the Respondent. He further argued that prohibiting the attaching of documentary evidence to the submissions are procedural rules which should not be used to defeat justice and is curable under **section 95 of the Civil Procedure Code, Cap, 33 R.E. 2019**. According to him the strict construction of the CPC and other procedural enactment are discouraged. He cited the case of **South British Insurance Ltd vs Mohamed Taibje** (1973) E.A 210, on that case he invited this court to consider the attached documents.

With due respect to the Appellant's counsel his line of argument rather novel and cannot be entertained. This is due to a long-established

principle that submissions are not evidence; see **Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 where the Court of Appeal of Tanzania held that:

"...submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

In the circumstance, the argument that this court should not be bound by the rule of procedures is untenable and unacceptable to the action at issue. That being the position of the law, I will not consider the attachments as listed above.

Back to the submissions in support of the appeal. Arguing the 1st ground of appeal counsel for the Appellant submitted that it is a principle of law that in mortgages where one of the spouses is borrowing, there must be a consent from the other spouse. He relied on **Regulation 5 of the Land (Mortgaging Financing) Regulations 2009 (as amended in 2019)** in arguing that the 2nd Respondent was supposed to take other steps in addition to steps set out in the regulation to satisfy herself that the assent of the spouse is informed and genuine. According to the Appellant's counsel the 2nd Respondent

would have paid a spying eye by asking the neighbours as to the marital status of the Mortgagee.

Submitting in regard to the 2nd ground of appeal, Counsel for the Appellant stated that it was upon the DLHT to believe the evidence of one Yusufu Kasesele as the one who sold the suit land to the Appellant. According to him the law requires the DLHT to believe such kind of witness. He did not however, elaborate about that said law nor cite it.

The 3rd and 4th grounds of appeal were combined and argued together that the 1st respondent was a compellable witness but was not called to testify. He also said that the ten-cell leader, the Street Chairman and the Ward Executive Officer were important witnesses but were not called.

In reply, counsel for the 2nd Respondent submitted in regard to the 1st ground of appeal that the complaint raised by the Appellant is untenable as the Respondent exercised due diligence before granting the loan to the 1st Respondent. He contended that the act of the 1st Respondent of swearing an affidavit regarding her marital status, a proof that she was the sole owner of the disputed house and the agreement between her and one Yusufu Kasesela signed by local government leaders and the receipts on payment of premium were

enough proof to the 2nd Respondent. The 2nd Respondent had nothing to doubt as to 1st Respondent ownership of the disputed property. As to the obligation of the Bank (mortgagee), Counsel for the 2nd Respondent cited the case of **Hadija Issa Arerary vs Tanzania Postal Bank**, Civil Appeal No. 135 of 2017 CAT at Iringa (unreported).

In view of the above cited case (the **Hadija Issa case**), counsel for the 2nd Respondent contended that the claim by the Appellant that he did not know about the loan is a trick between him and his wife to deprive the 2nd Respondent's right. He quoted a pertinent part of the decision which states that:

"we are increasingly of the view that the mortgagee was correct to disburse the loan believing that there was no any other third party with interest on the mortgaged property hence the mortgage was valid. The filing of an application by the appellant before the DLHT was therefore a calculated move to deprive the respondent Bank what it was supposed to recover."

As to the 2nd ground of appeal counsel for the 2nd Respondent submitted that the said witness (Yusufu Kasesela) testified regarding the sale of the land to the Appellant but did not give any comment to have sold the same to the 1st Respondent as she also presented documents to 2nd Respondent showing that she purchased the same from the very person. The learned counsel further argued that the 1st Respondent

bought the land on 10/12/2010 while the Appellant told the court that he purchased it on 12/12/2010 which is the indication that the 1st Respondent was the first to purchase the land. As to the claim of forgery, he contended that it is a new fact which should not be entertained by this court.

Arguing the 3rd and 4th grounds of appeal, counsel for the 2nd Respondent submitted that the Appellant was complaining as if the burden of proof laid to the 2nd Respondent which is not the case. That it was up to the Appellant to call the witnesses he thought would be helpful to prove his case. That he was not denied an opportunity by the DLHT to call all witnesses he desired. Again, Mr. Mbwilo argued that the Appellant did neither tender marriage certificate nor prove that the mortgaged house was house No. 0107 and not No. 0117 which is indicated in the loan agreement.

Moreover, Mr. Mbwilo contended that the claim by the Appellant that the mortgaged house was TDM/MGN/0117 while the labelled house to cover the loan was TDM/MGN/0107 was a new fact which was not pleaded by the Appellant in his pleading. He referred to **Order XXXIX Rule 27 of the Civil Procedure Code**, to state that the Appellant would have prayed to tender additional document or evidence as it was

said in the case of **Florian Steven Kitiwili vs Mariam Benedict Makombe**, Civil Appeal No. 136 of 2019. He therefore prayed for this court to dismiss the appeal for want of merits with costs.

In his rejoinder submissions, save for the arguments regarding the attached documents, counsel for the Appellant reiterated the content of his submission in chief. He insisted for the appeal to be allowed with costs.

I have dispassionately followed the rival submissions by the parties' counsel. I have also gone through the proceedings before the DLHT which show that among the issues deliberated by the Tribunal is who is the lawful owner of the suit property (mortgaged property). The DLHT came at the conclusion that it was the 1st Respondent who was the lawful owner. The conclusion was reached after the DLHT looked at exhibit P1- sale agreement tendered by the Appellant and exhibit D1 a loan agreement between the 1st Respondent and the 2nd Respondent.

Notwithstanding the findings of DLHT on the ownership of land, I shall first confine myself to the validity of the mortgage agreement entered between the 1st and 2nd Respondents. This is because the Appellant's grounds of appeal based on the complaint that the 1st Respondent obtained the loan by forging documents which was believed

by the 2nd Respondent. It is also the Appellant's complaint that the 2nd Respondent did not inquire into marital status of the 1st Respondent before advancing her the loan. The grounds of appeal therefore, can be conveniently determined by a single issue of whether the mortgage of the suit property was proper in law.

The procedure for mortgaging a landed property is well stipulated under the **Land Act, Cap. 113 R.E 2019** as amended **by the Mortgage Financing (Special Provisions) Act, of 2008**. I am alive of the fact that Mortgage procedures under the Act does not apply in the informal mortgage like the one at hand, but in my considered opinion, the principle thereunder can be a guideline to the instant matter. In that law, the responsibility of disclosing the information of the spouse is rested to the mortgagor (i.e loan applicant). **Section 114 (2) of the Land Act** provides that:

"....it shall be the responsibility of the 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."

Nonetheless, the law goes further requiring the Applicant to strengthen his/her information deponing an affidavit to express his

marital status. This is as per **Regulation 4 (1) (c) of the Land (Mortgage) Regulations, 2005** which reads:

"If the applicant states he or she is not married and the mortgagee has reason to believe that, the statement might be incorrect, the mortgagee may require the applicant to produce an affidavit to the effect that the applicant is not married."

Following the above requirement of the law, the responsibility available to the mortgagee (the Bank) is to inquire on the status of the mortgagee by necessary means available. In my concerted view the mortgagee has to extend measures to the mortgagor like to swear an affidavit which in the matter under consideration the 2nd Respondent did. For instance, she received affidavits of the 1st Respondent regarding; marital status and ownership of land. In the said affidavit the 1st Respondent declared not to be married (single). The averment by the Appellant's counsel that the 2nd Respondent was supposed to spy about the status of the mortgagor from her neighbours is a stretch of imagination as it is not the requirement of the law.

Since the 2nd Respondent acted on the strength of those affidavits by the 1st Respondent there was no reason that could have prevented her from disbursing the loan. I am inspired by the Court of Appeal

observation made in the case of **Hadija Issa Arerary vs Tanzania Postal Bank**, (supra) where it said that:

"In the instant case, it is undisputed that the mortgagor provided an affidavit proving that he was single. With that information, the mortgagee had no reason to disbelieve him. It is on the strength of the above information which the respondent verily believed it to be true that she disbursed the loan to.....".

For the sake of argument; the Appellant's allegation that he is the husband of the 1st Respondent was not proved in the DLHT. This is because, he neither tendered any document such as marriage certificate to prove their marriage nor called any witness in that regard. The Appellant just called PW2 (Yusuph Kasesele) who testified that he was the one who sold the disputed property to the Appellant since 2010. Nevertheless, the loan was obtained in 2018 whereby that witness was not able to state if he knew anything as to the marital status of the Appellant. Again for the sake of argument, if at all the Appellant had interest on the disputed land, he could have put a caveat to protect any activities to be done on the land without his knowledge (See the law and case laws).

Other complaints about whom was supposed to be called as a witness claimed by the Appellant; is not the prerogative of the DLHT. The Appellant being the applicant before the DLHT was duty bound to

prove all of his allegations on the principle that he who alleges the existence of a fact must prove.

At the end result, I find that the mortgage at issue was valid and there is no reason to fault the decision made by the DLHT. Hence the appeal is demeritorious, and thus dismissed with cost.


R.A. Ebrahim

JUDGE

Mbeya

30.09.2022

