

THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT- LAND DIVISION

(IN THE DISTRICT REGISTRY OF MUSOMA)

AT MUSOMA

LAND APPEAL CASE No. 7 OF 2022

*(Arising from the District Land and Housing Tribunal for Mara at Musoma in
Land Application No. 152 of 2016)*

CHRISTINA GACHUMA MAKERE APPELLANT

Versus

1. KAHAMA OIL MILLS LTD }
2. YEHOYADA NYAMHANGA KIHHERE } RESPONDENTS

JUDGMENT

02.11.2022 & 02.11.2022

Mtulya, J.:

Christina Gachuma Makere (the appellant) had approached the **District Land and Housing Tribunal for Mara at Musoma** (the tribunal) on 8th September 2017 and filed **Application No. 152 of 2016** (the application) against **Kahama Oil Mills Ltd** (the first respondent) and **Yehoyada Nyamhanga Kihere** (the second respondent) complaining that the second respondent is her husband and had mortgaged matrimonial house located at **Plot 506 Block T within Idara ya Maji area of Bunda in Mara Region** (the plot), to the first respondent without her consent hence the mortgage be pronounced null and void for want of her consent.

After a full hearing of the application, the tribunal resolved in favour of the respondents and reasoned at page 4 of the judgment that:

Baraza hili baada ya kusikiliza ushahidi wa Mwombaji halijapata uthibitisho wowote wenye kuridhisha kama kweli mwombaji Christina Gachuma ni mke wa Mjibu Maombi Namba 2, Yehoyada Nyamhanga Kihere, kwa maana kwamba hakuna Cheti cha Ndoa kilichotolewa hapa Mahakamani. Mbaya zaidi hakuna hata shahidi mmoja huru aliyeletwa hapa mahakamani na Mwombaji kuthibitisha madai yake kuwa ni mke wa Mjibu Maombi Namba 2.

Following this reasoning of the tribunal, the appellant approached **Mr. Emmanuel Paul Mng'arwe**, learned counsel to file two (2) reasons of appeal to protest the decision of the tribunal in the application. The reasons, in brief show, that: first, the tribunal erred in law in asking marriage certificate in customary marriage; and second, failure of the tribunal to critically evaluate the evidences produced by the appellant during the hearing of the application.

Today morning, when the appeal was scheduled for hearing, Mr. Mng'arwe submitted that it was wrong for the tribunal to give less weight on oral evidence produced by the

appellant and require proof of documentary evidence in form of a Certificate of Customary Marriage whereas the respondents' oral evidence registered by **Mr. Juma Said Obote** (DW2) was given higher weight and was believed by the tribunal in testifying presence of another wife of the second respondent called Nchagwa Marwa.

In substantiating his submission Mr. Mng'arwe cited the provision of section 25 (1) (d) and 43(5) of the **Law of Marriage Act [Cap. 29 R.E. 2019]** (the Law of Marriage) and precedent of this court in **Daniel Msele Manyonyi v. Prisca Mnyaga Nyansura** (PC) Civil Appeal case No. 87 of 3019, contending that customary marriage is well known by the law and practice of this court without any evidence of customary marriage certificate.

On the second ground Mr. Mng'arwe submitted that the tribunal declined to critically analyze evidences brought before it as the appellant registered good materials to show that she was a wife of the second respondent, but the tribunal did not give the weight it deserves and considered the evidence of DW1 which also had no any proof of documentary evidence.

In protest of the submissions registered by Mr. Mng'arwe, the first respondent had marshalled Mr. Mashaka Tuguta, learned counsel to reply the reasons of appeal, whereas the second respondent declined services despite several attempt to

call him through normal and substituted service hence the suit proceeded *ex-parte* against him. According to Mr. Tuguta the main issue before the tribunal was: *whether the second respondent was duty bound to consult the appellant before he mortgaged the plot to the first respondent*, and not whether the appellant was a wife of the second respondent. The issue of wife and husband just appeared by the way in the course of determining the application in the tribunal.

According to Mr. Tuguta the second respondent entered into a mortgage contract after abiding with the laws and procedures enacted under section 59 (1) of the Law of Marriage and section 114 of the **Land Act [Cap. 113 R.E. 2019]** (the Land Act) and followed all necessary procedures including consultation of the wife of the second respondent, Nchagwa Marwa and hamlet leaders who know Nchagwa Marwa very well as exhibited in **Mkataba wa Wakala wa Ununuzi wa Pamba Msimu wa Mwaka 2016/2017** (Mkataba) admitted in the application as an exhibit D.1.

Regarding the appellant evidence before the tribunal, Mr. Tuguta contended that she cannot be trusted as reliable and credible witness as she failed to prove her case as per required standard in section 110 (1) & (2) of **the Evidence Act [Cap. 6 R.E. 2022]** (the Evidence Act) and Court of Appeal (the Court)

precedents in **Charles Richard Komba t/a BUILDING v. Evarani Mtungi & Two Others**, Civil Appeal No. 38 of 2012 and **Ernest Sebastian Mbele v. Sebastian Sebastian Mbele**, Civil Appeal No. 66 of 2019. In order to bolster his submission on credibility and reliability of the appellant, Mr. Tuguta submitted that: first, during oral testimony in the tribunal, the appellant testified that they were married with the second respondent in 1999, whereas in her pleading she displayed 2000; second, she mentioned neighbors, four children, and many other people who witnessed her traditional marriage ceremony and living in one roof with the second respondent, but declined to call them to testify in her favour; and third, she could not mention the seller of the plot; and finally she admitted to have offered advices only to second respondent during the plot transactions.

According to Mr. Tuguta, the appellant intentionally declined to call material witnesses as she knew they would have testified against her interest hence adverse inference may be drawn against the appellant as per precedent in **Hemed Said v. Mohamed Mbuki** [1984] TLR 113. Mr. Tuguta also distinguished the precedent in **Daniel Msele Manyonyi v. Prisca Mnyaga Nyansura** (supra) contending that it did not resolve land dispute, but determined purely matrimonial matter of a wife and husband. Finally Mr. Tuguta prayed the appeal be dismissed

without any order to costs because the appeal does not only lack merit, but also the first respondent is a good and lenient person who would not prefer costs to venerable community of women.

In a brief rejoinder, Mr. Mng'arwe contended that the standards inquired by Mr. Tuguta with regard to credibility and reliability of witnesses is for learned minds and not ordinary villagers, like the appellant. In his opinion, the several cited issues raised by Mr. Tuguta must consider the appellant's status and level of appreciating issues. According to Mr. Mng'arwe, the appellant is a lay person and cannot be aware of several requirements of the law on discrepancies of dates of marriage, calling of material or independent witnesses to testify in her favour or following-up a proof of customary marriage certificate after the customary marriage contract.

On my part, I think, the dispute which was brought before the tribunal was: *whether the second respondent was duty bound to seek consent of the appellant*, and the reply is found at exhibit D.1 and section 114 of the Land Act, which I will not be detained to interpolate. The Law in section 114 (1) (a) of the Land Act require a mortgage of matrimonial home to have evidence of any document used during application of a mortgage signed or assented by the mortgagor and spouse living in the matrimonial home.

In the present case there is evidence of the second respondent's wife, Nchagwa Marwa assenting the mortgage in presence of family members and hamlets leaders, *viz*: Mr. Sesilia Masiko (respondent's sister), Paulo Sakui (respondent's friend), Mtaki Makaja (Mtaa Chairman), Raymond Bukombe (Ward Executive Officer) and the contract was witnessed by Kenneth Mwembe (Resident Magistrate), as displayed in exhibit D.1. On the other hand, the appellant declined to call at least one material witness to support her allegation as per required precedents in **Azizi Abdallah v. Republic** [1991] TLR 71 and **Sungura Athumani v. Republic**, Criminal Appeal No. 291 of 2016.

This court cannot allow a practice of loopholes where there are possibilities of any woman to allege to be wife of any mortgagors. That may cause peril to mortgagees. It is unfortunate in the present case, the appellant cannot even recall precise year of marriage with the second respondent and name of the seller of the plot.

During the hearing of the instant appeal, I consulted and asked the learned minds in Mr. Mng'arwe and Tuguta on whether after the contract in exhibit D.1, the first respondent was duty bound to search for other wives before concluding Mkataba. The question received divergent replies from learned minds. According to Mr. Mng'arwe, the second respondent

enjoyed customary marriage hence the first respondent was required to search all the customary wives belonged to the second respondent, whereas Mr. Mashaka contended that the reply was already enacted in section 114 of the Land Act to rescue mortgagees in the circumstances like the present one.

I have glanced section 114 (1) (a), (b) and (2) of the Land Act and perused exhibit D. 1, it is obvious that the first respondent cannot be shouldered more burden than necessary. It is fortunate that an incident like the present one in the application had already happened in Iringa in the precedent of **Hadija Issa Arerary v. Postal Bank**, Civil Appeal No. 135 of 2017 and the Court resolved against a wife and reasoned that:

...the mortgagee was correct believing that there was no any other third party with interest on the mortgaged property hence the mortgage was valid.

The position was cherished by this court in the precedent of **Maryam Nassor v. Abla Estates Developers and Agency Limited**, Land Case No. 140 of 2020 and **Agripina Revelian v. Savera Aloys Lukaza**, Land Appeal Case No. 70 of 2018. The only appropriate remedy available for wives in the circumstances like in the instant appeal is to register caveat in matrimonial properties (see: **Idda Mwakalindile v. NBC Holdings Corporate**, Civil Appeal No. 59 of 2000 and **Hadija Issa Arerary v. Postal**

Bank (supra). The Court in **Hadija Issa Arerary v. Postal Bank** (supra), with approval of the precedent in **Idda Mwakalindile v. NBC Holdings Corporate** (supra) stated that:

...there was no any caveat whatsoever registered, then the appellant cannot benefit from the provisions of section 59 (2) of the LMA and section 161 of the Land Act on account of the fact that she did not have a registrable interest in the mortgaged property....

Having said so, and considering the cited paragraphs of the Court, I do not need to be detained any further as I am bound to follow the precedents resolved by the Court. I am therefore moved to dismiss the appeal for lack of good reasons and uphold the decision of the tribunal in the application. I do so without of order as to costs as prayed by Mr. Tuguta. Each party shall bear its costs.

Ordered accordingly.

Right of appeal explained to the learned counsels.



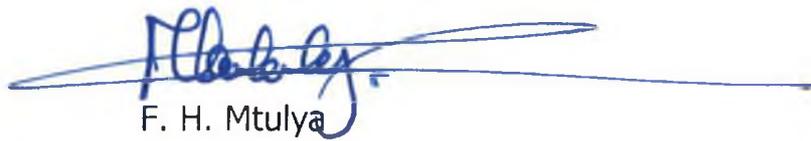


F. H. Mtulya

Judge

02.11.2022

This judgment was delivered in chambers under the seal of this court in the presence of the appellant, **Christina Gachuma Makere**, and his learned counsel, **Mr. Emmanuel Paul Mng'arwe**, and in the presence of **Mr. Mashaka Tuguta**, learned counsel for the first respondent, Kahama Oil Mills Ltd.



F. H. Mtulya

Judge

02.11.2022