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

COMMERCIAL CASE NO. 3 OF 2004

SAMWEL OLUNG'A IGOGO.....1ST OBJECTOR/APPLICANT
RUKIA MFAUME .....2nd OBJECTOR/APPLICANT
RUTH MASHAM.....3rd OBJECTOR/APPLICANT

VERSUS

THE SOCIAL ACTION TRUST FUND.....1ST RESPONDENT/DECREE HOLDER
TRADE GOOD LIMITED.....2ND RESPONDENT/JUDGMENT DEBTOR
ERIC AUCTION MART LIMITED.....3RD RESPONDENT
MFAUME ABDALLAH KITIMBU.....4TH RESPONDENT } JUDGMENT
IMAN ELIKUNDA MASHAM.....5TH RESPONDENT } DEBTORS

RULING

KALEGEYA, J:

I should start by making an observation on the titling of parties. Throughout the documentations filed subsequent to Igogo's application, Rukia and Ruth have been indicated as being 1st and 2nd Objectors/Applicants, respectively. However, as Igogo filed the objection first, for consistency in this ruling, I have entitled him 1st objector to go with the sequence of their respective knocking at this Court's door. Rukia and Ruth are entitled, 2nd and 3rd Objector accordingly.

On 7/8/2002, the Plaintiffs and the 1st Defendants executed a loan Agreement by which the former extended a shs.100 million loan facility to the latter. The said loan, among others, was secured by legal mortgages over the rights of occupancy Nos. 25617, 49840 and 186252/82 in the names of Joseph Ndiege (2nd Defendant), Mfaume Abdallah Kitimbu (3rd Defendant)

and Imani Elikunda Masham (4th Defendant) respectively. The facility was not serviced as required. By 30/1/2004, when this action was instituted, the total liability (inclusive of the principal sum and interest) had reached shs.129,084,972.37. The Plaintiffs then sued for recovery of the said amount; sale of mortgaged properties, further interest at Court rate and costs.

On 2/4/2004, the matter was settled through mediation as per terms of the following consent settlement order,

"1. That the Plaintiff is entitled to payment of shs.134,986,040/= by the Defendant as of today, 2nd April, 2004. The said sum is inclusive of the principal sum and accrued interest.

2. That the Defendants shall pay the said sum in four instalments of shs.50 million by 30th, June, 2004; shs.40 million by 30th Sept. 2004; shs.30 million by 31st December, 2004 and shs.14,986,040/= by 31st March, 2005.

3. That the Defendants shall pay the costs on the very date the last instalment is paid

4. That in the event of default on any of the instalments the Plaintiff to execute the decree including disposal of charged assets in the debenture and mortgaged properties in terms of the Loan Agreement."

The Defendants having decided to stand miles away from the said consent order, in September, 2004, the Plaintiffs/Decree – holders successfully applied for execution by attaching the mortgaged properties.

Attachment warrants jolted Igogo (1st Objector), Rukia (2nd Objector) and Ruth (3rd Objector) into action by filing objection proceedings. Rukia and Ruth charged that they are Kitimbu and Masham's wives respectively; that they have double edged interests in the properties – as matrimonial property and matrimonial home, and further that as they did not give their consent to their being mortgaged, the attachment warrants against the said properties should be raised. On the other hand, Igogo urged that he has never been a party to the mortgaging transaction of his house and that therefore it cannot be subject of attachment in the present transaction.

Mr. Ntonge, Advocate, appeared for Ms. Rukia and Ruth, (2nd and 3rd Objectors) while Mr. Ogunda and Ms. Shio, Advocates appeared for the 1st Objector and Respondent/decree – holder respectively.

In my investigations, apart from submissions by Counsel and affidavits by deponents, the latter were also subjected to cross examination.

Starting with Igogo's objection, while I sympathise with the Decree – holders, the obvious is that the application has to be allowed. Notwithstanding Ms Shio's determined cross examination, the investigation has revealed the following.

Joseph Ndiege (not Ndege), the owner of Plot No. 551, Block A part II, Tabata Area, Dar es Salaam with title deed No. 25617 died in 1993.

How the deceased's property came to enter the saga, Igogo unchallengedly stated that Iddi, his son, sold the plot to him; that the purchase price was shs.1 million but only shs.500,000/= has so far been paid; that the shs.500,000/= was paid in two instalments of shs.300,000/= and shs.200,000/=; that Iddi has refused to receive the balance and has instead filed a case at Kisutu Resident Magistrates' Court challenging the sale.

Notwithstanding his death, the Mortgage Deed and the Guarantee and Indemnity Deeds attached to Plaint show that these were executed by Joseph Ndiege in person, in August, 2002, almost ten years after his death! The obvious is that the said documents were executed by a fictitious person who posed as Joseph Ndiege. This criminal act can in no way encumber the disputed property because, even if Igogo/Iddi dispute did not exist, the said Iddi himself could not have mortgaged it without changing the title into his name first, as a legal personal representative of the deceased. The criminal doors are not closed: the lender can proceed against whoever played the rough illegal game.

Turning to Rukia and Ruth, although in their oral narrations under cross examination, expanding on their respective affidavits, they tried tooth to nail to show that the properties in question are both matrimonial property and matrimonial homes, I was not convinced of the former. Rukia stated that she contributed shs.3.5 million towards the purchase price but this was

just a flat allegation. She insisted that she gave the said sum to her husband and yet urged,

> *"The house was bought in .....instalments...one million and then 2 million. The balance was paid later and on their understandings"*

(meaning buyer and her husband). She added however that she gave her husband the shs.3.5 million in lumpsome but never made a follow up of its utility!

Although in marriage relations most matters transpire without records, in situation like these, where both husband and wife are fighting to save their roof under – whatever costs, Courts have to be very careful with mere flat allegations. More evidence than mere allegations in affidavits or just oral responses under cross examination should be adduced to establish the joint ownership. I am thus not convinced of Rukia's alleged joint contribution towards the purchase of the disputed property.

Same approach and reasoning applies to Ruth who stated that she contributed more – shs.9 million out of shs.15 million allegedly put into that property, contradicting Masham who said that he contributed more as he was a Director of Civil Aviation with more earnings while Ruth was a teacher.

I should pose here and observe that I am quite aware of current law that domestic duties and related performed by wives are recognized as due contributions towards matrimonial properties.

But Rukia and Ruth, employees, have not approached the issue from that angle. And, I should add that not every property acquired during the subsistence of the marriage is joint property as between the husband and wife. Each of the two can acquire his or her own property and it will remain recognized as such. S. 60 of The Law of Marriage Act has the following:

> *"60. 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;*
>
> *(b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal."*

Treading on the above analysis, as the titles are only in Kitimbu and Masham's names and as no joint interests were entered in the land Register by Rukia and Ruth and as they have not proved up to the standard required of any joint contribution, their flat claims of joint ownership stand dismissed.

What about the 2nd leg – matrimonial home? On this, I have been satisfied that indeed the properties are. That they are wives, legally, has not been challenged. So is their occupation of the said premises – that is where the families reside.

The Law of Marriage Act (s. 2 (1)) defines *"Matrimonial home"* as follows –

> *"The building or part of a building in which the husband and wife ordinarily reside together and includes –*
> *(a) where a building and its curtilage are occupied residential purposes only, that curtilage and any outbuildings thereon..."*

As regards whether the wives were notified of the mortgaging transactions by the husbands, the latter maintain that they didn't. Again, here, both the husbands and wives may be employing that stand in order to save the matrimonial homes. They (wives) may have been informed of the transactions but in the absence of any other evidence the allegations stand unchallenged. What is obvious however is that there is no consent by either Rukia or Ruth.

The 2nd and 3rd objectors urge, making reference to **s. 59 of The Law of Marriage Act,** that the properties could not be encumbered without their consents and so is the case under s. 112 (3) of The Land Act, 1999, and that lack of spouses' names on the titles do not bar recognition of their interests (s. 161 (1) (2) of The Land Act).

The 1st Respondents (Decree – holders) launched a challenge by making reference to **Idda Mwakalindile vs NBC (CAT) Civil Appeal No. 59/2000 (Mbeya) Registry,** insisting that there is no way the Respondents could have known of the existence of the interests.

S. 59 of The Law of Marriage Act, (Act 5 of 1971) has the following:

"59. (1) Where any estate or interest in the matrimonial home is owned by the husband or by 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.

(2) Where any person alienates his or her estate or interest in the matrimonial home in contravention of subsection (1), the estate or interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until -

(a) the marriage is dissolved; or

(b) the court on a decree for separation or an order for maintenance otherwise orders,

unless the person acquiring the estate or interest can satisfy the court that he had no notice of the interest of the other spouse and could not by the exercise of reasonable diligence have become aware of it."

On the other hand, s. 112 (3) of The Land Act (Act 4 of 1999) provides:-

"A Mortgage of a matrimonial home, including a customary mortgage of a matrimonial home shall be valid only if –

(a) any document or form used in applying for such a mortgage is signed by or there is evidence from the document that it has been assented to by the borrower and any spouse of the borrower living in that matrimonial home;

(b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the borrower living in that matrimonial home..."

The said Land Act, under s. 161 goes further to provide:

"161 (1) Where a spouse obtains Land under a right of occupancy for the Co – occupation and use of both spouses or where there is more than one wife, all spouse, there shall be a presumption that, unless a provision in the certificate of occupancy or certificate of customary occupancy clearly states that one spouse is taking the right of occupancy in his or her name only or that the spouse are taking the land as occupiers in common, the spouses will hold the land as occupiers in common and, unless the presumption is rebutted in the manner stated in this

subsection the Registrar shall register the spouses as occupiers in common.

(2) Where land held for a right of occupancy is held in the name of one spouse only but the other spouse or spouses contribute by their labour to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of the labour to have acquired an interest in that land in the nature of an occupancy in common of that land with the spouse in whose name the certificate of occupancy or customary certificate of occupancy has been registered.

(3) Where a spouse who holds land or a dwelling house for a right of occupancy in his or her name alone undertakes a disposition of that land or dwelling house, then -

(a) where that disposition is a mortgage, the lender shall be under a duty to make inquiries of the borrower ***has or as the case may be****(?), have consented to that mortgage in accordance with the provisions of section 59 of the Law of Marriage Act, 1971;*

(b) where that disposition is an assignment or a transfer of land, the assignee or transferee shall be under a duty to make inquiries of the assignor or

> *transferor as to whether the spouse or spouses have consented to that assignment or transfer in accordance with section 59 of the Law of Marriage Act, 1971,*
>
> *and where the aforesaid spouse undertaking the disposition deliberately misleads the lender or, as the case may be, the assignee or transferee as to the answers to the inquiries made in accordance with paragraphs (a) and (b), the disposition shall be voidable at the option of the spouse or spouses who have not consented to the disposition."*

Now, applying the Law of Marriage Act and The Land Act on the facts at hand, again with regrets to the Decree – holders who have parted with their money on seemingly bogus securities, the said laws are not in their favour.

While I appreciate that under s. 59 (2) of the Law of Marriage Act lack of a spouse's consent to a Mortgage where the lender could not have possibly discovered the spouse's interest does not take away the said lender's recovery rights as held by the CAT in **Mwakalindile's case,** I should hastily add that s. 112 and 161 of The Land Act quoted above have now taken away that levellage.

The mortgage documents were never signed by either Rukia or Ruth nor is there evidence on the face of the documents that they assented (s. 112 (1)). This alone makes the mortgage documents invalid.

The transactions sustain another fatal blow under s. 161 of the same Land Act.

I consider s. 161 (1) to be inapplicable because there is no evidence that in obtaining the respective rights of occupancy, Kitimbu and Masham did so for the **occupation and use** with their spouses. The intention under this provision 161 (1) should not be assumed. It should be proved.

Neither is s. 161 (2) applicable because, as earlier on held, the wives' contributions have not been established.

Under s. 161 (3) (a) however the lenders are aptly netted. The buoyance they enjoyed under s. 59 (2) of The Law of Marriage Act is taken away. They are duty bound to inquire of existence of the spouse's consent or otherwise (although the version of The Act I have, seems to have some words missing in that subsection 161 (3) (a)).

Under s. 59 (2) of The law of Marriage Act, lenders could simply urge that there was no way they could have been aware of the existence of the spouse's interest as they did not see any incumbrance in the Land Register upon due search. I am satisfied that this was the line of reasoning adopted by the Court of Appeal in **Mwakalindile case**.

The Court of Appeal did not deal with the provisions of The Land Act in question and I think primarily because it had not effectively been put into operation although legally, as per commencement date, it was.

Now however, search in the Land Register alone is not enough. The lender has to go further and inquire about the existence of spouse and inquire whether due consent has been secured.

And, I should hurriedly add that the provisions of the Land Act on this do not contradict s. 59 of The Law of Marriage Act. They simply supplement. But even if they had contradictory elements, s. 181 of the Land Act provides the cure. The said sections states,

> *"181. On and after the comme –ncement of this Act, notwithstanding any other written law to the contrary, this Act shall apply to all land in Mainland Tanzania and any provisions of any other written law applicable to land which conflict or are inconsistent with any of the provisions of this Act shall to the extent of that conflict or that inconsistency cease to be applicable to land or any matter connected with land in Mainland Tanzania."*

What is obvious therefore is that the lenders (the decree – holders) did not conduct inquires regarding Rukia and Ruth's consent under s. 161 (3) and this takes us back to s, 112 (3) of The Land Act and s. 59 (1) of The Law of Marriage Act (read together) which make a transaction without spouse's consent invalid.

In the finality, again, I should express my regrets that the securities relied upon by the Decree – holders to part with their monies have melted right between their very fingures but that is the law.

For reasons stated, the three objections stand allowed.

However, regard being had to the obvious that the decree – holders stand out as losers as they parted with their monies and as the 2nd and 3rd objectors together with their husbands as per their affidavits clearly ganged up to save their roofs, in the interest of justice to the decree – holders I award them no costs as that would tantamount to adding salt to injury. Similarily, I award no costs to Igogo because of his inaction since 1996 to make all attempts to transfer the title into his name thus creating fertile ground for fraudulent actions. It is ordered as above.

L.B. KALEGEYA

JUDGE

Delivered

L.B. KALEGEYA

JUDGE

22/2/2005

3,025 words