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IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J. A., MWAMBEGELE, J. A. And MWANDAMBO, J. A.)

CIVIL APPEAL NO. 135 OF 2017

HADIJA ISSA ARERARY .... APPELLANT

VERSUS

TANZANIA POSTAL BANK .... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Iringa)

(Shangali, J.)

dated the 3rd day of March, 2017
in
Land Appeal No. 13 of 2016

....

JUDGMENT OF THE COURT

29th April & 11th May, 2020

MZIRAY, J.A.:

In the District Land and Housing Tribunal for Iringa at Iringa (DLHT) in Application No. 74 of 2012, the appellant herein sued the respondent jointly and together with Frank Beny Mwanuke, Julius Andrea Pangani and Viovena and Company Limited who were the first, second and fourth respondents respectively but are not parties to the instant appeal. She claimed for a declaration that the mortgaged property is a matrimonial home; the surrender of the original title deed for the mortgaged property;

payment of special damages to the tune of TZS 3,000,000.00 and general damages in the sum of TZS 2,000,000.00.

The brief facts which led to the institution of Application No. 74 of 2012 before the DLHT are that, Julius Andrea Pangani, the then second respondent, using as a collateral the title deed of his house located on plot No. 10 Block "V", Ilala in Iringa Municipality, guaranteed a loan of undisclosed amount which was advanced by the respondent to Frank Beny Mwanuke, the first respondent in the DLHT. The title deed showed that the mortgaged property was registered under the sole name of Julius Andrea Pangani and in the affidavit he deponed to show his marital status he averred that he was single. Upon being satisfied by the information furnished by Julius Andrea Pangani that the mortgaged property was free from any incumbrance, the respondent issued the loan facility to Frank Beny Mwanuke, on the terms and conditions agreed upon by the parties. It is unfortunate that he failed to pay the loan. Consequently, upon default and in accordance with the terms agreed upon, the respondent exercised her option to sell the mortgaged property and to that effect she sought the services of Viovena and Company Limited and instructed her to attach and sell the mortgaged property to recover the unpaid loan advanced. It is this background which prompted the appellant to rush and seek redress in the

DLHT alleging among other things that she being the legal wife of the mortgagor, in law, her consent was to be sought and obtained before embarking on the mortgage transaction.

After the trial, the DLHT declared the mortgaged property as a matrimonial home and restrained its sale. It compelled the respondent to surrender the title deed to the appellant. Other reliefs like special and general damages were brushed aside.

Being aggrieved, the respondent successfully appealed to the High Court. In its reasoned decision, the High Court held that the appellant failed to establish that she was the spouse of the mortgagor on account of the fact that the mortgaged property was registered in the sole name of the mortgagor who had also deponed in an affidavit that at the material time he was single. It came to the conclusion that the respondent was entitled to sell the mortgaged property to recover her debt.

Still aggrieved, the appellant approached this Court in a second appeal, armed with a memorandum of appeal consisting of five grounds of complaint which are; **one**, the decision to sell the mortgaged property did not consider the requirement under section 59 (2) of the Law of Marriage Act; **two**, the first appellate court erred in law and facts when it held that

the deponed affidavit (exhibit D1) was not defective; **three**, the first appellate court erred in law and facts by holding that the respondent took reasonable steps to verify the marital status of the appellant's spouse; **four**, the first appellate court erred in law and facts by holding that the appellant's interest in the mortgaged property could not have been protected by a caveat only without considering section 161 (1) of the Land Act, Cap 113 R.E. 2002; **five**, the first appellate court erred in law and facts by holding that the matrimonial property be sold without justification as to how much was to be paid in considering that the guarantee and mortgage deeds were not produced by the respondent.

At the hearing of the appeal, Mr. Rutebuka Samson Anthony, learned advocate appeared for the appellant; whereas the respondent enjoyed the services of Mr. Innocent Mhina, learned advocate.

When given the floor, Mr. Anthony first adopted the written submissions he filed on 29/1/2018 and abandoned the fifth ground of appeal. He combined ground 1 and 4 and submitted that the mortgaged property being a matrimonial home, it was necessary to seek the appellant's consent as per the requirement of section 59 of the Law of Marriage Act, Cap 29 R.E. 2002 (LMA). As consent was not sought and

obtained, the first appellate court decided wrongly that the mortgaged property be sold to recover the loan which was unknown to the appellant, he argued. In connection to the fourth ground of appeal, he argued that the first appellate court slipped in an error by stating that the interest in the mortgaged property can only be protected by a caveat which in his view is wrong because the appellant cannot be deprived her interest in the mortgaged property merely because there was no caveat filed. In his considered view a caveat is just a notice and even if the appellant did not lodge any caveat still, she was protected by section 161 (1) of the Land Act, Cap 113 R.E. 2002 (the Land Act).

Submitting in respect of the second ground, the learned advocate supported the finding of the DLHT to the effect that exhibit D1, an affidavit deponed by the mortgagor, was defective as it contravened the provisions of section 10 of the Oaths and Statutory Declarations Act, Cap 34 R.E. 2019. In his view, the effect of that irregularity is as if there was no affidavit deponed at all. Since there was no affidavit, then the mortgage executed contravened section 114 of the Land Act, as amended by section 8 (3) of the Mortgage Financing (Special Provisions) Act No. 17 of 2008 (Mortgage Financing Act), he argued.

In respect of ground three, the learned advocate argued that, section 114 (1) (a) and (b) of the Land Act requires consent of the spouse to make the mortgage valid. In addition, he argued that the mortgagee was required to take reasonable steps to inquire on the marital status of the mortgagor before executing the mortgage deed, which in his view was not done by the mortgagee. He argued that the respondent's act of inquiring on the details of the mortgaged property from the tenants could not amount to reasonable steps as contemplated by the law. It would have amounted to reasonable steps if the respondent would have made such inquiry by involving the leaders of the place where the mortgaged property is situated like the ten cell leader, street executive officer or street chairperson, he argued.

When probed by the Court in respect of the marital status of the appellant, Mr. Anthony responded that the appellant merely said in her evidence that she is the wife of the guarantor and such assertion has been proved by the husband. He conceded that the husband contradicted himself with what he deponed in his affidavit to the effect that he was single. He reiterated that the first appellate court was wrong when it ordered the mortgaged property to be sold because such order took away the interest of the appellant in the mortgaged property.

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In reply, Mr. Mhina adopted his written submissions and in response to grounds 1 and 4, he submitted that the first appellate court was correct to disregard section 59 (2) of the LMA for failure of the appellant to comply with section 59 (1) of the said Act which required a party with interest in a mortgaged property to protect it by lodging a caveat in a Land Registry. He strengthened his position by citing the case of **Idda Mwakalindile v. NBC Holding Corporation and Another**, Civil Appeal No. 59 of 2000 (unreported).

Responding to ground 2, the learned advocate submitted that the deponed affidavit was not defective as correctly found by the first appellate court. He argued that the omission to insert the heading of the word verification did not affect the contents of the affidavit. He termed the error as minor and insignificant.

Submitting in response to ground No. 3, the learned advocate supported the findings of the first appellate court in holding that the respondent took reasonable steps to verify the marital status of the appellant's spouse before executing the mortgage deed as clearly shown in the testimony of DW1 who testified for the respondent Bank. The learned advocate further argued that section 8(2) (3) of the Mortgage Financing

Act which amended section 114 of the Land Act, is very clear that once by an affidavit the Applicant (borrower/Guarantor) declares that there were no spousal interest in the mortgaged property, a mortgagee shall be deemed to have discharged the responsibility for ascertaining marital status.

Finally, he submitted that the case was proved on a balance of probabilities hence the appeal should be dismissed with costs.

Mr. Anthony had nothing to rejoin. He just reiterated his prayers he made in the submissions in chief.

We have seriously considered the grounds of appeal, the parties written submissions and the arguments for and against advanced by the learned advocates. The crucial issue we are called upon to decide is whether the mortgage of the suit property was proper in law. In resolving this issue we will combine all the grounds of appeal and discuss them jointly.

The main complaint of the appellant is that the suit property could not have been mortgaged because it was a matrimonial property in which her consent was to be sought and obtained. The procedure for mortgaging a landed property is well stipulated under the Land Act and the Mortgage

Financing Act. Prior to the amendment of section 114 of the Land Act which was effected through section 8 (2) (3) of the Mortgage Financing Act, the duty was imposed on the mortgagee under section 59 (1) of the LMA compelling any party who had an interest over a property to be mortgaged to register a caveat so as to preserve his/her interest. After the amendment, the lodging of a caveat is no longer a requirement of the law as per section 8 (2) (3) of the Mortgage Financing Act which has shouldered the responsibility to the mortgagor to disclose the information of the spouse. For ease of reference, section 8 reads as follows:-

> *"... 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."*

That is the position of the law in as far as the issue of disclosure is concerned. However, to strengthen his information, the mortgagor is required to depone an affidavit to express his marital status as required by 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."

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 Frank Beny Mwanuke; the then first respondent before the DLHT.

It is to be noted that during the hearing at the DLHT, the learned advocate who appeared for the appellant objected to the admissibility of the affidavit arguing that it was defective. It is very apparent that the objection did not focus on the contents of the affidavit. The question we ask ourselves is, was it correct for the DLHT to determine the validity of the affidavit? In our considered view the DLHT should not have engaged itself to determine the validity of the affidavit. As rightly decided by the first appellate court, what mattered was the contents of the affidavit on

which the mortgagor deponed that he was single. The mortgagor never denounced the contents of the affidavit and the appellant cannot challenge it since she was not the one who deponed it. The appellant is barred by the principle of estoppel articulated under section 123 of the Evidence Act, cap 6 R.E. 2002 (now R.E. 2019) that:-

> *"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing."*

As we have stated, the contents of the affidavit were not challenged and the respondent acted on the strength of that affidavit then there was no reason that could have prevented her from disbursing the loan. We therefore subscribe to the findings of the first appellate court at page 95 of the record of appeal where it stated that:-

> *"...the same person has never denounced his affidavit. It was the trial District tribunal which declared the affidavit defective as if the issue before the tribunal*

was on the legality of the affidavit. The affidavit whether defective or not had already completed its work, namely to convince and lure the mortgagee to advance the loan to the 1st respondent."

Since it was sufficiently proved that the mortgagor was not married and 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. In the case of **Idda Mwakalindile v. NBC Holding Corporation** (supra) we held that:-

> *"Under the Law of the 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 sole name of her husband."*

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.

On the foregoing reasons, this appeal has no merit and is hereby dismissed in its entirety with costs.

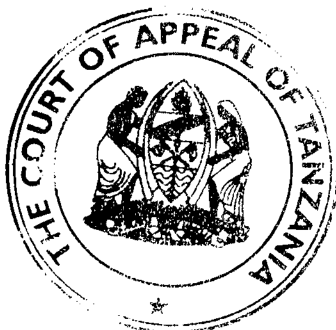
DATED at **IRINGA** this 8th day of May, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 11th day of May, 2020 in the presence of Mr. Rutebuka Samson Anthony, learned counsel for the Appellant and Mr. Rutebuka Samson Anthony holding brief of Mr. Innocent Mhina for the Respondent is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL

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