

15 May 2020



Court cements issue of spousal consent in mortgages

- Big clarificatory breakthrough for banks
- Wife claims to have not given consent
- Court holds affidavit and reasonable steps taken were adequate

On 11 May 2020, the Court of Appeal (Court) issued its judgment in the case of H.I. Arerary (Appellant) versus Tanzania Postal Bank (TPB, Bank or Respondent), the Court comprising of Honourable Justices Mziray, Mwambegele and Mwandambo, JJJ.A.

The judgment of the Court authored by Honourable Justice Mziray came to the rescue of TPB and the banking sector stating that since the Mortgagor had stated by way of an affidavit that he was not married, and the bank had taken reasonable steps to verify this, the Appellant who claimed to be the wife of the mortgagor cannot now benefit from the Law of Marriage Act where a spousal consent is required before registration of a mortgage.

Brief background

TPB advanced money to F.B. Manuke (Borrower) using as collateral a title deed of Julius A. Pangani (Mortgagor) who deponed in an affidavit that he was not married. The Borrower defaulted, and the bank exercised its rights to sell the mortgaged property. However, the Appellant claiming to be the wife of the Mortgagor, alleged that her consent to create the mortgage was not obtained.

In the District Land and Housing Tribunal (DLHT), the Appellant successfully sued TPB restraining the sale and obtained a declaration that the mortgaged property was a matrimonial home over which a mortgage could not have been created without a spousal consent. Being aggrieved, TPB successfully appealed to the High Court, where the High Court held that the Appellant failed to establish that she was the spouse of the Mortgagor on account that the mortgaged property was in the sole name of the Mortgagor who had also deponed that he was single in an affidavit. The High Court concluded that TPB was entitled to sell the mortgaged property to recover the loan. Being aggrieved, the Appellant preferred this appeal against TPB at the apex Court.

Arguments by the parties

The Appellant argued that the mortgaged property being a matrimonial home could not have been mortgaged by the mortgagor without consent of the wife as required by section 50 of the Law of Marriage Act. Further, the Appellant argued that the High Court erred by having stated that the interest in the mortgaged property can only be protected by a caveat. The Appellant also attacked the affidavit deponed by the Mortgagor as being defective and that it could not have been relied upon, in addition to stating that the Bank should have taken reasonable steps to inquire on the marital status of the Mortgagor and that merely inquiring from the tenants does not amount to reasonable steps under the law.

In its response, TPB asserted that a party with an interest in a mortgaged property must protect it by filing a caveat. The Respondent also defended the affidavit as not being defective as the error on it, if at all, was only minor and insignificant. Lastly, the Respondent defended the steps taken by the Bank on whether or not the Mortgagor was married.

For further information on legal updates please contact:

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LEGAL UPDATE

FB ATTORNEYS

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Decision of the Court

After hearing rival arguments, the Court narrowed down the crucial issue for determination as being whether or not the mortgage was proper under our laws. The Court held that with amendments to the Land Act, filing of a caveat was now not a requirement. The Court elaborated that the law states that it is the responsibility of the Mortgagor to disclose whether she/he has a spouse or not, with the Mortgagee then having to take 'reasonable steps' to verify this.

The Court further held that under the Land (Mortgage) Regulations 2005, the Mortgagor is required to depone an affidavit to express his marital status, as was the case in this matter, and what mattered were the contents of the affidavit, which the Mortgagor did not denounce nor were they challenged. The Court agreed with the High Court that the affidavit, whether defective or not, had already completed its work.

The Court stated that the Appellant cannot challenge the affidavit as she was not the one who deponed it and went ahead to invoke section 123 of the Evidence Act in holding that the Appellant was barred by the principle of estoppel.

Finally, the Court, in dismissing the appeal, held that the Bank 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.

This is a welcome decision for banks, who should however still ensure that they obtain affidavits and take reasonable steps to verify the marital status of Mortgagors.

To read a copy of the judgment, [click here](#).

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