

16 November 2023



CoA Confirms Sale of Mortgaged Matrimonial Property despite Absence of Spousal Consent

- Position of two mortgages on same collateral clarified
- Previous spousal consent held to be ineffectual to second mortgage
- Second mortgage invalidated for lack of spousal consent
- CoA protects bona fide purchaser despite mortgage invalidation

Recently, the Court of Appeal of Tanzania (CoA) delivered its judgment in Civil Appeal No. 280 of 2020. This appeal sought to challenge the decision of the High Court of Tanzania in Land Case No. 46 of 2015 which held that no spousal consent was obtained in respect of a second mortgage. As a result, the second mortgage and the sale of the mortgaged matrimonial house were declared invalid and were accordingly nullified by the High Court.

Brief Background

The Respondents, namely Mrs. Shakila Parves and Mutabasam Parves (first and second Respondent, respectively) got married in 2002 and were residing in the mortgaged house at Mwanza. The said house was registered in the name of the second Respondent. In 2013, without the knowledge and consent of the first Respondent, the second Respondent applied and obtained a loan from Twiga Bancorp Limited, now Tanzania Commercial Bank (the first Appellant) and mortgaged their matrimonial home, that is, the mortgaged house for that purpose (the second mortgage). Upon default by the second Respondent, the first Appellant instructed Tambaza Auction Mart (second Appellant) to sell the mortgaged house by public auction and the same was sold to Thomas Barnabas (the third Appellant). It should be noted that, in 2004, the second Respondent used the mortgaged house as a collateral in the loan (the first mortgage) that was advanced to a company which the second Respondent was one of the Directors. The first mortgage was executed after the required consent from one Rukia Parves (who is the second Respondent's first wife) had been sought and obtained for that purpose.

Believing that the second mortgage and the sale of the mortgaged house were a nullity for want of her consent, the first Respondent instituted a suit in the High Court where the second mortgage was found to be invalid for want of spousal consent. Consequently, the said second mortgage and the sale of the mortgaged house were declared invalid and were nullified by the High Court. Being aggrieved, the Appellants preferred this appeal against the Respondents to the CoA.

In the said appeal, the Appellants advanced a number of grounds of appeal which were framed into three issues, namely: (i) whether there were two different and independent financial arrangements or loans and mortgages over the mortgaged house; (ii) whether the consent by the first wife obtained in 2004 covered the financial arrangement or loan and the mortgage executed in 2013 which was secured by the same mortgaged house; and (iii) whether the sale of the mortgaged house to the third Appellant was lawful.

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The Judgment

In determining the first issue, the CoA held that there were two different and independent loans and mortgages that were secured by the same collateral. The mortgaged house pledged as collateral for the loan advanced by the first Appellant in 2004, and then for the other loan which was advanced in 2013. The loan and the first mortgage executed in 2004 was in respect of the company, while the second mortgage executed in 2013 was for the second Respondent in his personal name. Even though the second Respondent was one of the Directors and members in the said company, that fact could not have defeated the legal position in law that a company has its own distinct legal personality different from its individual members.

Further, concerning the second issue, the CoA ruled that since the second Respondent had two wives who both had interests in the mortgaged house, their respective consent ought to have been obtained as required by section 114(1), (4) (a) and (b) of the Land Act. The said section requires any document or form used in applying for a mortgage of a matrimonial home to be signed/assented to by the mortgagor and the spouse or spouses of the mortgagor living in that matrimonial home. The CoA further held that the lack of the required spousal consent for the second mortgage was in contravention of the mandatory requirement under the above cited provision as well as section 59(1) of the Law of Marriage Act. To cement on that position, the CoA referred the case of NBC vs. Nurbano Abdallah Mulla, Civil Appeal No. 283 of 2017(Unreported) where the Court ruled that the obligation of the mortgagee before finalizing the loan issuance procedure, was to take reasonable steps to ascertain whether the application for the mortgage has the spousal consent as required by the law. It was also stated that, the obligation is not cast upon the mortgagee only but also upon the mortgagor who has a reciprocal duty to disclose that he has the consent of his spouse or spouses as the case may be.

In determining the validity of the sale of the mortgaged house, the CoA ruled that, since the third Appellant is a bona fide purchaser for value without notice, and there being no evidence of fraud or misrepresentation, his rights over the mortgaged house are legally protected under section 135 (1), (2) and (3) of the Land Act. The CoA referred the case of Peter Adam Mboweto vs. Abdallah and Another [1981] T.L.R where it was held that in case of bona fide purchaser, the rule is that the sale will be upheld notwithstanding the reversal of the decree, because otherwise there will be less inducement to intending purchaser to buy at an auction sale and consequently less chance of the property fetching a proper value at such sales. Another reason is that a purchaser cannot be expected to go behind the judgement to inquire into the irregularities in the suit.

Lastly, having found that the sale of the mortgaged house cannot be declared invalid despite the invalidation of the mortgage, the CoA declared that a person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power. In simple words, the first Respondent has a remedy in damages against the first Appellant and second Respondent who equally contributed to the ailment of the mortgage and to the resultant sale of the mortgaged house.

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

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