

TANZANIA / JUDGMENT

RUHINDA JUDGMENT

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IN THE HIGH COURT OF TANZANIA (MWANZA SUB-REGISTRY) AT MWANZA LAND APPEAL NO. 15809 OF 2024 (Arising from Land Application No.26 of 2019 in the District Land and Housing Tribunal for Mwanza at Mwanza) CRDB BANK

PLC.....APPELLANT VERSUS ASHURA MOHAMED
SAID.....1ST RESPONDENT MUHSIN MAHMOOD
RUHINDA.....2ND RESPONDENT

JUDGMENT

26h November, 2024 & 12th March, 2025 KAMANA, J. This is an appeal against a ruling of 29th November, 2023 entered by Hon. Masao, Chairman of the District Land and Housing Tribunal for Mwanza (DLHT). The ruling was that the appellant be precluded from selling Plot No. 1079 Block LL, Kiloleli, Mwanza and that the said plot be removed from being collateral for the loan taken by the second respondent from the appellant as the first respondent, being the second respondent's wife did not consent. The appeal is premised on the following grounds: 1

1. That the trial tribunal erred in law and fact by holding that the first respondent has a legal interest in the house in dispute (Plot No. 1079 Block LL, even though it was proved in evidence that the respondent does not live in the said property in dispute.
2. That the trial tribunal erred in law and fact by holding that the first respondent has a legal interest in the house in dispute, even though the first respondent had failed to prove the existence of a valid marriage with the second respondent.
3. That the trial tribunal erred in law and fact by removing the house in dispute as collateral for the loan that was granted to the second respondent, even though it was proved in evidence that the appellant had accepted the property to be collateral for the said loan after having obtained a spouse consent from the second respondent's wife who was living in the said property in dispute.
4. That the trial tribunal erred in law and fact by delivering a decision without considering the adduced evidence by the parties and the requirement of the law. 2 Based on those grounds, the appellant seeks the reversal of the judgment and decree made by the DLHT. The factual background of the matter is that in 2015 the second respondent who goes by the name of Muhsin Mahamood Ruhinda borrowed TZS 30,000,000/- from CRDB Bank Plc, the appellant.

The loan was secured by a mortgage of the second respondent's house situated at Plot No. 1097 Block LL Kiloleli, Mwanza. As the law dictates, the second respondent was obliged to furnish his spouse's consent to the mortgage. The same was given by Naima Ibrahim Salim, the second respondent's wife. Both the mortgage deed and spousal consent were admitted as Exh. DE2. Things did not go well as the second respondent failed to service the loan as scheduled. The failure prompted the appellant to initiate the process of selling the mortgaged property to recoup the debt. In that course, Ashura Mohamed Said, the first respondent who is also the second respondent's wife, became aware of the fact that the house in question, which in her view, is her matrimonial home was about to be sold. Her reaction was to file the Land Application that led to this appeal. 3 At the trial, the first respondent testified as PW1. She evidenced that she is the second respondent's wife and was unaware that the second respondent borrowed money from the appellant. She testified to have an interest in the house. Responding to questions put by the assessors, the first respondent stated that she was married to the second respondent on 22nd October, 2011 as a third wife. She evidenced that the second respondent has three wives including her. She testified that the elder wife lives in the disputed house. PW1 stated that she lives in Nyasaka where the second respondent rented the house. Suleiman Samson (PW2) testified that he attended the marriage ceremony of the respondents that took place in October, 2011 at Nyakato Meko. In defence, Robert Hassan Lusana, testified that the appellant took the loan from the appellant in 2015. He stated that the second respondent secured the loan by a mortgage of the disputed property. The witness testified that the second respondent submitted a spousal consent of Naima Ibrahim Salim. He evidenced that following the default, the appellant sought to sell the house to recoup the debt. 4 After pondering the evidence, the DLHT was satisfied that the first respondent was the second respondent's wife. It was its view that the first respondent, being the second respondent's wife did not consent to the mortgage of the matrimonial home. Further, the DLHT held the view that the appellant negligently failed to ascertain whether there were other spouses or third parties with interest in the said house. Given that, the DLHT pronounced the orders which I have stated hereinabove. Reverting to the appeal at hand which was disposed of by way of written submission, the discussion and determination of the appeal revolve around the first and third grounds of appeal as they dispose of the appeal in question. Submitting in support of the first ground, Mr. Tumaini Msechu, learned Counsel for the appellant, faulted the DLHT for holding that the first respondent has an interest in the disputed house. He contended that the first respondent had no legal interest in the disputed house as she evidenced that she was not living in the said house. He amplified that since the first respondent was not living in the disputed house, the mortgage can not be invalidated in terms of section 114(1) of the Land Act, Cap. 113 [RE.2019]. 5 The learned Counsel went on to argue that according to section 114(1), the mortgagee, in this case, the appellant, is required to obtain spousal consent only from the mortgagor's spouse or spouses who live in the matrimonial home. He expounded that since the interpretation of the words "matrimonial home" as per section 112(2) of the Land Act entails the premise that the husband and wife ordinarily reside, the disputed house is not a matrimonial home so far as the first and second respondents are

concerned as the former was not living in the said house. On the third ground, Mr. Msechu submitted that the DLHT misdirected itself in removing the disputed house from being collateral for the loan taken by the second respondent. The learned Counsel augmented that the said house was placed as collateral by the first appellant after obtaining the spousal consent of Naima Ibrahim Salim who is the second appellant's wife. He argued that since the consent was given by the second respondent's wife who was living in the disputed house, the mortgage was legally created. Responding to the first ground, Mr. Alex Lwoga, learned Counsel for the respondents, contended that the first respondent is the second respondent's wife and they have been living together in the disputed 6 house. Based on that, the learned Counsel argued that the DLHT was correct to conclude that the first appellant has a legal interest in the said house. The learned Counsel added that the first respondent married to the second respondent on 22nd October, 2011 and they acquired the property in question. He cited the case of *Chakupewa v. Mpenzi and Another* [1999]1 EA 32 which describes what constitutes a "matrimonial asset." As regards the third ground, Mr. Lwoga contended that the DLHT was correct in removing the disputed property from being collateral. He asserted that the appellant acted negligently in accepting the spousal consent of the unknown person. He went on to argue that the appellant was placed under the duty to verify the correctness of the spousal consent. To buttress his contention, he cited the case of *Access Bank Tanzania Limited v. Sophia Salum Seif (The Administratrix of the Estate of Fatuma, Salum @Fatuma Salum Seif) and 3 Others*, Land Appeal No. 3363 of 2024-HC (Unreported). Before I embark on determining the appeal, worthy to note is that this court being the first appellate court is enjoined to objectively reevaluate the evidence adduced during the trial and come to its conclusion so far as the facts are concerned. See: *Leonard Dominic 7 Rubuye t/a Rubuye Agrochemical Supplies v. Yara Tanzania Limited*, Civil Appeal No. 219 of 2018. Further, I am alive to the principle that the burden to prove the existence of the alleged fact is with the party alleging the existence of such fact and the standard of proof is on the balance of probabilities. See: *Leonard Dominic Rubuye t/a Rubuye Agrochemical Supplies v. Yara Tanzania Limited* (Supra). In determining the appeal, I wish, for the purpose of understanding, to reproduce the contents of section 112(2) of the Land Act which interprets the term "matrimonial home" as follows: "matrimonial home" means the building or part of a building in which the husband and wife ordinarily reside together and includes-

- (a) where a building and its cartilage are occupied for residential purposes only, that cartilage and any outbuildings thereon; and
- (b) where a building is on or occupied in conjunction with agricultural land or pastoral land, any land allocated by the husband or the wife, as the case may be, to his or her spouse for her or his exclusive use;' 8 My understanding of the interpretation of the term 'matrimonial home' is that for the building or part of the building to be considered a matrimonial home, the husband and wife must ordinarily reside in the said building or part of it. In this, I am fortified by the position of the Court of Appeal in the case of *National Bank of Commerce Ltd v. Nurbano Abdallah Mulla* [2020] 1 T.L.R 531 when interpreting section 2 of the Law of Marriage Act, Cap. 29 [RE.2019] which is *pari materia* with section 112(1). It had this to state:

‘From the above provision, we are of the considered view that a property will be termed a matrimonial home when the spouses ordinarily occupied it as their family residence.’ In the cited case, the Court was satisfied that the disputed house which was mortgaged by the respondent’s husband was a matrimonial home as she was residing in it with her children. Starting with the first ground, as I have recapitulated, the learned advocates held different views so far as the house in question is concerned. Mr. Msechu for the appellant was of the firm belief that from the evidence the first respondent had no interest in the house as she was not living there. Mr. Lwoga for the respondents had a different view⁹ as he believed that the first respondent had an interest in the house as she was living in the said house. The divergent views of the legal minds before me precipitated me to reevaluate the evidence adduced by the first respondent to establish whether she proved that the disputed house was a matrimonial home within the meaning of section 112(2) of the Land Act and section 2 of the Law of Marriage Act. In her evidence in chief, the first respondent did not utter a single word that indicated that she was living in the disputed house other than stating that she had an interest in the said house. Likewise, in cross-examination, she said nothing about living with her husband in the said house. Worse enough, when asked questions by the assessors, the first respondent stated that the second respondent had three wives. She explained that each wife has got her own home whereas the second respondent rented a house at Nyasaka for her. From this evidence, it is undisputed that the first respondent was not living in the disputed house. This means that the mortgaged house, so far as she is concerned, is not a matrimonial home within the purview¹⁰ of sections 2 and 112(2) of the Law of Marriage Act and the Land Act respectively. Mr. Lwoga’s argument that the first respondent and the second respondent were living in the disputed house has no merits as it is not supported by evidence. Actually, I am flabbergasted by Mr. Lwoga’s temerity to bring that contention while it is clear as crystal in the records that the first respondent did not testify to having been living in the disputed house. What she testified is that the first respondent’s elder wife was the one living in the disputed house. Before I conclude to determine the first ground, with due respect to Mr. Lwoga, he misdirected himself to cite the case of *Chakupewa v. Mpenzi* (Supra). The said case interpreted the term “matrimonial asset” and not “matrimonial home”. While the matrimonial home is part of matrimonial assets, the latter is not necessarily a former except when the spouses ordinarily reside in it. This position was firmly stated by the Court of Appeal in the case of *National Bank of Commerce Ltd v. Nurbano Abdallah Mulla* (Supra) in which the Court had this to state: ‘On the other hand, the phrase matrimonial property has a similar meaning to what is referred as matrimonial asset¹¹ and it includes a matrimonial home or homes and all other real and personal property acquired by either of both spouses before or during their marriage.....For that reason, we think that not all real properties acquired by the spouses during the subsistence of marriage are matrimonial home. The phrase matrimonial home therefore should in our view confine to the house where the spouses ordinarily reside.’ At this juncture, it is my finding that the first respondent did not prove her interest in the disputed house within the meaning of matrimonial home as interpreted by respectively sections 2 and 112(2) of the Law of Marriage Act and the Land Act. The first ground succeeds. I now turn to determine

the third ground. The legal minds locked horns as they held different views. While Mr. Lwoga contended that the appellant was negligent by failing to ascertain the correctness of the spousal consent, Mr. Msechu was antithetical to the former's contention. I asked myself how the DLHT found itself determining whether the appellant was negligent or otherwise. In her evidence, the first respondent did not testify that she did not know Naima Ibrahim Salim. Likewise, she did not testify that Naima Ibrahim Salim was not the 12 second respondent's wife. Clearly, she stated that there was a possibility that the second respondent got spousal consent from his other wife. With that evidence, no element of negligence on the part of the appellant was proved by the first respondent. What was done by the DLHT amounts to deciding the case on hypothetical issues without the support of the evidence adduced by the parties. This ground also succeeds. In the final analysis, I allow the appeal with costs. I set aside the judgment and decree pronounced by the DLHT. Order accordingly. Right To Appel Explained. DATED at MWANZA this 12th of March, 2025. KS KAMANA JUDGE

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