

TANZANIA / JUDGMENT

finca microfinance bank ltd another vs fatuma jumanne soloka 2 others 2024 tzhc 112 5 february 2024

COURT
TZHCDECIDED
5 February 2024

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IN THE HIGH COURT OF TANZANIA MUSOMA SUB-REGISTRY AT MUSOMA CIVIL APPEAL NO. 25 OF 2022 (Original from Civil Case No. 14 of 2019 of the District Court of Bunda) FINCA MICROFINANCE BANK LTD..... 1st APPELLANT CHAMPION AUCTION MART.....2nd APPELLANT VERSUS FATUMA JUMANNE SOLOKA..... 1stRESPONDEN GALANI BULILO GALANI..... 2ndRESPONDEN MWANAID RAJABU MASINI..... 3rdRESPONDEN

JUDGMENT

04 December 2023 & 05 February, 2024 During trial, the 1st respondent (plaintiff) sued both appellants and the 2nd and 3rd respondent jointly and severally for the loan of Tsh 30,000,000/= which was executed on 12/07/2018 by the 2nd respondent and 1st appellant via collaterals which are house hold, fixed assets and motor vehicle (T 181 BKD) which are said to be matrimonial assets. It was said the legal wife, 1st respondent did not consent to the use of collateral specifically, a motor vehicle. Appellants claimed that the loan was secured by the motor vehicle which is the property of the 2nd respondent herein and the consent of his Page 1 of 11 legal wife was obtained and to them, the first respondent has no interest on mortgaged properties the motor vehicle inclusive. Out of Tsh. 30,000,000/=, 2nd respondent managed to repay only Tsh. 19,615,895.35/= and outstanding balance is Tsh. 18,327,549.75/=. Appellants announced the sale of the motor vehicle to recover unpaid loan and the sale was objected by the 1st respondent. After a full trial, the trial court found the consent of the 1st respondent herein was necessary as she was a legal wife and collaterals were matrimonial properties. Appellants were disgruntled by the said decision and knocked the door of this court advancing three grounds of appeal that;

1. The trial District Court erred in law and facts by basing its judgement on evidence contradictory to respondent's pleadings.
2. The trial District Court erred in law and facts by not finding the duty to disclose marital status lies upon the mortgagor.

3. The trial District Court erred in law and facts by holding that the respondent has interest in the mortgaged properties by relying on documents which were not part of the court record. 1st and 3rd respondents failed to enter their appearance before this court. And upon proof of service of summons this court allowed the matter to proceed ex-parte against the 1st and 3rd respondent respectively. When the Page 2 of 11 appeal was called on for hearing, the appellants was represented by Ms. Atupele Mwambosya, an advocate while 2nd respondent appeared in person, unrepresented. While arguing the appeal Ms. Mwambosya submitted that the appeal originating from Case No 14 of 2029 Bunda District Court and the appellants is aggrieved by the trial court decision which declared the 1st respondent as the winner. After she abandoned the 3rd ground, she was of the submission on the 1st ground that, the trial court erred to accept submission by the 1st respondent herein during trial because she informed trial court that she has Islamic Marriage with the 2nd respondent and had BAKWATA certificate while at paragraph 6 (b) of the plaint she said she had a customary marriage with 2nd respondent herein and attached the dowry letter. She protested and said that was not right in eyes of law. Citing the decision in Salim Said Mtomekela vs Mohamed Abdallah Mohamed (Civil Appeal No. 149 of 2019) [2023] TZCA 15 (15 February 2023) where the court at page 5 ruled to the effect that each party is bound by his/her own pleading and court too is bound by pleading of parties and the testimony has to base on pleadings. Page 3 of 11 She said in the trial court this was not considered and the trial court based his analysis on Islamic marriage which was submitted orally during hearing. She insisted that 1st respondent and 2nd respondent herein are not husband and wife and they just fabricate issues to restrict appellant from selling the property. On the 2nd ground about marital status. She submitted that it was the duty of the 2nd respondent to state his marital status but the trial court shifted the burden to the 1st appellant, the bank, that was supposed to verify the status. She clarified that in appellants' then WSD, there was spouse consent signed by 3rd respondent herein and that person was introduced by the 2nd respondent who was the borrower. The spouse consented the motor vehicle to be used as a security for loan. Because bank needed the spouse and the borrower introduced 3rd respondent, bank believe that 3rd respondent was the only spouse and not otherwise. It was her further submission that the vehicle registration card had only one name of 2nd respondent which is Galani Bulilo Galani. The 1st appellant had no reason to doubt the presentation of the borrower as he was the Page 4 of 11 sole owner of the vehicle. Relying the decision in Hadija Issa Arerary vs Tanzania Postal Bank (Civil Appeal 135 of 2017) [2020] TZCA 217 (11 May 2020), she said Bank believed story by the borrower and had no reason to misbelieve him. In the case at hand, she said the 2nd respondent informed trial court that 1st respondent herein is his legal wife and under section 123 of Cap 6 the 2nd respondent made the bank to believe he has only one wife and it was not just to inform the trial court that he had two wives as the previous information was acted upon. She prays this appeal to be found meritorious and the trial court decision be nullified and appellants to be allowed to sale the property to service the remaining debt and the costs of the case to be paid by all respondents. 2nd Respondent while acknowledging to have a debt with 1st appellant, he mentioned items he deposited as security to include a house and a motor vehicle that is tittle deed and registration card

respectively. He said he managed to repay 20,000,000/= out of 30,000,000/= then he failed. He clarified that it was the only the 3rd respondent who gave her consent although he nodded having Islamic marriage with the 1st respondent and the certificate to be genuine. Page 5 of 11 About the debt he admitted to be indebted by the 1st appellant and submitted that he was not in a position to pay debt that's why he did not object sale of his house which is already sold. He said he own the motor vehicle and he don't resist if it will be decided it must be sold because he cannot repay the loan. He prayed the appeal be allowed but due to his economic status as all his items were sold by financial institution and the rest is the subject matter of this appeal, he prayed the appeal be allowed without costs. During rejoinder, Ms.

Mwambosya requested this court to note that in his submission 2nd respondent was referring all properties to be his own and not jointly owned. She insisted the Islamic marriage that prove the pleading was not considered. She prayed this court to find the 2nd respondent is willing his vehicle to be sold and pray the seizure order and sale of motor vehicle to be issued and insisted on costs to be borne by all respondents. Due to the fact that what triggered the 1st respondent to file Civil Suit No. 14 of 2019 was a public notice of sale of the 2nd respondent's motor vehicle, Isuzu Journey with registration Number T181 BKD via Mtanzania Page 6 of 11 News paper, I moved parties to address this court on the issue of spouse consent on properties which are movable. Ms. Mwambosya was of the submission that the requirement of the law is when a person mortgage the house, the spouse consent is required and the borrower is supposed to declare his marriage status as per Mortgage Financing (Special Provision) Act No. 17 of 2008. She submitted that the requirement is for landed properties only as the intention is to provide the family with knowledge of what is going on in their property which is occupied by the family. She said in this appeal the security is a vehicle which the family is not residing in. That is to say, it is not true that when it will be sold children will suffer as it is the property which when used as collateral there is no need to notifying wife. She presented that the vehicle is owned by 2nd respondent who is the borrower. 2nd Respondent said that is the legal issue which he doesn't know but he is not resisting the sale of his vehicle as he is not in a position to repay the loan. He insisted that it is the only asset he has. That make the end of submission by parties. My duty is to determine if the appeal has merit by analysing grounds as submitted and or issues raised. Page 7 of 11 This being the first appeal, the principle in *The Registered Trustees of Joy in The Harvest vs. Hamza K. Sungura*, Civil Appeal No. 149 Of 2017, CAT at Tabora (Unreported) is that, this court can re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny From record, 1st respondent read the public notice of sale of motor vehicle and objected the sale claiming that the said motor vehicle which is owned by 2nd respondent herein is matrimonial property as she participated in its acquisition. She witnessed a contract for sale and therefore it is matrimonial property and her consent was needed. When I prompted parties on the issue of spouse consent, counsel for the appellants submitted that the requirement of spouse consent is on landed properties, which are immovable. I agree with her and the intention of introducing spouse consent is to safeguard family members from becoming homeless when mortgagor take action. The motor vehicle in question is not landed property neither a matrimonial property as the record shows the

vehicle is owned by 2nd respondent. The mere fact that 1st respondent witnessed the sale does not amount the property to be matrimonial neither co owned. The Road traffic Act, Cap 168 R.E 2002 which guide the registration of motor vehicles provide that the name of the owner(s) of the Page 8 of 11 vehicle must be printed in the registration card. See section 11(3) of Cap

168. Reading Exh D2 which is the copy of the registration card, it shows the sole owner is GALANI BULILO GALANI who is the 2nd respondent herein. S. 11(3) Where a motor vehicle or trailer is owned by two or more persons, the registration shall be effected in the name of all the owners; and in no circumstances shall registration of a motor vehicle or trailer be effected under a business name (whether registered or unregistered) or under the name of any unincorporated body: Provided that where the owner is a society registered under the Societies Act 3, the society may be registered as such owner. If the motor vehicle was intended to be matrimonial property or jointly owned by second respondent's family/wives, it could have name of a wife or wives but that was not the issue. This court is of the position that the motor vehicle is owned by the 2nd respondent and it was the 2nd respondent who use it as collateral for his own loan. However, on the 2nd ground as submitted by the counsel for the appellants that so far as the 2nd respondent presented consent of one wife in securing loan as there was landed property, he is stopped under section 123 of Cap 6 from introducing another wife as the 1st appellant already acted on his action and believe what was presented by him when he was securing the Page 9 of 11 loan just as was in Hadija Issa Arerary vs Tanzania Postal Bank (supra) that; 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. So far as the borrower presented the 3rd respondent as spouse and signed all document declaring the guarantee of the loan, 1st appellant had no reason to believe there is another person with interest over the securities declared by the borrower and guarantor including the motor vehicle in question as picked in Exh DI which is the Loan Agreement. From analysis I find the first ground of appeal has merit. Further, I find the 1st respondent's claim was not proved to the required standard, which is to the balance of probability as she had two different version of her type of marriage contrary to what was pleaded. In plaint, she said they had customary marriage but during hearing she submitted Islamic marriage certificate. As was said in a number of authorities that parties are bound by their own pleadings. So far as she said they had customary marriage then she was supposed to prove the customary Page 10 of 11 marriage as pleaded and not other ceremony. As adduced and submitted by the counsel for appellants on the second ground of appeal, I find the ground to be meritorious. See James Funke Ngwagilo vs. Attorney General [2004] TLR 161, Charles M. Mbusiro vs John Bunini, Land Appeal No. 6 of 2021 and Said Salum Mtomekela vs Mohamed Abdallah (supra). For the foresaid reason, I find merit in this appeal. Had the learned Trial Magistrate evaluated properly the evidence adduced by the 1st respondent, he would have noted that she (the 1st respondent) had not proved the facts deposed in the pleadings. In the final analysis, I allow the appeal by quashing and setting aside the judgment and decree of the

trial tribunal. Costs of the case to be borne by the 1st respondent as initiator of all of this. M. L. KOMBA v I JUDGE / 05th February, 2024 Page 11 of 11

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