

**THE HIGH COURT OF THE
UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO. 112 OF 2018

(Appeal from the decision of Temeke District Land and Housing Tribunal at Temeke in
Land Application No. 150 of 2016 (Hon. R. Mwakibuja, Chairman))

DORA MUHONI (the Legal Representative of
the late **LUCY MKWEMA**).....**APPLICANT**

VERSUS

FINCA TANZANIA LIMITED.....**1st RESPONDENT**
NOJA YOHANA.....**2nd RESPONDENT**
MAJEMBE AUCTION MART.....**3RD RESPONDENT**
JOHASHI YUDA.....**4TH RESPONDENT**
KURWA BAKARI.....**5TH RESPONDENT**

Date of Last Order: 27.01.2020
Date of Judgment: 23.03.2020

JUDGMENT

V.L. MAKANI, J

This is an appeal by DORA MUHONI (the legal representative of the late LUCY MKWEMA). She is appealing against the decision of Temeke District Land and Housing Tribunal at Temeke in Land Application No. 150 of 2016 (Hon. R. Mwakibuja, Chairman).

At the Tribunal the late Lucy Mkwema prayed for declaration that the house which was under the Residential Licence. No. 0029941, TMK/KEK/MAG.6/89 situated at Keko Magulumbasi, Temeke District (the **suit house**) was a matrimonial property and so the purported mortgage of the suit house in favour of the 1st respondent was void.

The late Lucy Mkwema also prayed for a declaration that the purported auction of the suit house was also void. She further prayed for general damages for trespass and costs.

The Tribunal found that the late Lucy Mkwema failed to prove that she was the wife of the 2nd respondent. The Tribunal further found that the 2nd respondent lawfully guaranteed the loan taken by the 4th respondent in favour of the 1st respondent and offered the suit house as security. The application was therefore dismissed with costs for lack of merit.

After the decision of the Tribunal the Lucy Mkwema passed away and her legal representative Dora Muhoni (her daughter), was not satisfied with the decision of the Tribunal. She therefore filed in this court this appeal with the following grounds:

- 1. That the Trial Tribunal erred in law and facts in holding that the late Lucy Mkwema is not the wife/spouse of the 2nd respondent.*
- 2. That the Trial Tribunal erred in law and facts in holding that the suit property is not the matrimonial house of the late Lucy Mkwema and the 2nd Respondent.*
- 3. That the Trial Tribunal erred in law and facts in holding that there was no need of consent of the late Lucy Mkwema to the mortgage of the suit property.*

With leave of the court the appeal was argued by way of written submissions.

The written submissions by the applicant were drawn and filed by Mr. Joseph Kipeche of Kipeche Royal Attorneys. He argued the 1st and 3rd

grounds together. He said the testimony of the late Lucy Mkwema who testified at the Tribunal as PW1 was categorically not challenged. He said the late Lucy Mkwema said she was married to the 2nd respondent and their marriage was blessed with seven children and they had been in the suit house since 1971. He said the reasoning by the Tribunal that there was no evidence by a document to prove existence of the marriage was unwarranted because in section 61 of the Evidence Act Cap 6 RE 2002 a fact can be proved by oral evidence and that the law of Marriage Act, 1971 was not enacted when the marriage between the late Lucy Mkwema and the 2nd respondent was contracted in 1963. He further stated that there was no need to call a neighbour to prove presumption of marriage as the number of witnesses does not matter but rather the quality of the evidence. He stated that the evidence by the late Lucy Mkwema was credible.

Mr. Kipeche further stated that the reasoning by the Tribunal that the 2nd respondent by relying on Exhibit D3 (affidavit by the 2nd respondent) that his wife had died a long time ago was completely biased as the affidavit did not state the marital status of the 2nd respondent. He thus said that the 1st and 2nd respondents violated the requirement of section 114 of the Land Act as amended by section 8(2) of the Mortgage Financing (Special Provisions) Act, 2008 which requires the mortgagor to disclose that he has a spouse and upon such disclosure the mortgagee ought to have taken reasonable steps to verify that the 2nd respondent has or does not have a spouse. Mr. Kipeche relied on the case of **EFC Tanzania MFC Limited vs. Farida S. Hyera, Land appeal No. 47 of 2015 (HC-Land Division)** (unreported). Mr. Kipeche said the record does not show

that the mortgagee (1st respondent) did any due diligence on the marital status of the 2nd respondent. He said section 114 of the Land Act as amended by section 8(2) of the Mortgage Financing (Special Provisions) Act, 2008 was violated; and since there was no spouse consent the mortgage transaction was a nullity as it violated the provisions of section 59(1) of the Law of Marriage Act, 1971 and section 112 of the Land Act which requires consent to a mortgage of a matrimonial home.

As for the second ground, Mr. Kipeche more or less repeated his previous arguments that the evidence by the late Lucy Mkwema that she was the wife of the 2nd respondent and she started living in the said house in 1971 was not challenged. He further said that the house was obtained by both Lucy Mkwema and the 2nd respondent and thus it suffices to be a matrimonial home within the meaning of section 2 of the Law of Marriage Act and the provisions of the Land Act. With these reasons, Mr. Kipeche prayed for the appeal to be allowed with costs.

The submissions by the 1st and 5th respondents were drawn and filed by Mr. Beatus Malawa, Advocate from the Legal department of the 1st respondent, FINCA Tanzania Limited. As for the first ground Mr. Malawa said that the Tribunal reached the decision that the late Lucy Mkwema was, according to the records, not the wife of the 2nd respondent. He said the late Lucy Mkwema did not present any document or bring any witness to prove that she was married to the 2nd respondent. He said it was upon the late Lucy Mkwema to adduce

enough evidence apart from her own words of mouth to convince the Tribunal that she was the wife of the 2nd respondent. He was of the view that neighbours and local authority officers were proper witnesses to prove marital status where there were no documents available. Mr. Malawa said the affidavit/declaration that was sworn by the 2nd respondent stating that he was the absolute owner of the property meant he had no partner who had interest in the suit house. He said it is true that the mortgagee has a responsibility of conducting a due diligence according to section 8(2) of the Mortgage Financing Special Provision Act, 2008 but according to section 8(3) of the same Act the mortgagee is discharged of their responsibility once there is an affidavit or written and witnessed document which declares that there is a spouse or any third party holding interest in the mortgaged land. He said in the present case the 2nd respondent produced the written document witnessed by Hon. Magistrate named M.M. Kondo dated 14/01/2013 stating that he was the sole owner of the suit house and no one could claim any interest. He said Counsel was misleading the court that the affidavit did not mention the marital status of the 2nd respondent but there is no specific model of an affidavit that has been mentioned by section 8(3) of the Mortgage Financing Special Provision Act, 2008 and so the document that was provided by the 2nd respondent was enough to prove that there was no person who had interest in the said suit house wherein consent was required.

As for the second ground Mr. Malawa submitted that since the late Lucy Mkwema was not the wife of the 2nd respondent the spouse consent was not required. He said the case of **EFC Tanzania MFC**

Limited (supra) cited by Counsel for the appellant is distinguishable in that the mortgagor in the cited case used someone else not his wife to swear and sign an affidavit of spouse consent. On such circumstances, Mr. Malawa was of the view that the mortgagee ought to verify if the person who signed the said document is the actual wife of the guarantor. But in the present case there is a witnessed document that the 2nd respondent is the sole owner of the suit house and so there is no one who could claim interest in the said property. Mr. Malawa further stated in the alternative that if it is proved that the 2nd respondent did lie to the court that he did not have a wife and/or a partner while in essence the late Lucy Mkwena was his wife then the court should invoke section 8(4) of the Mortgage Financing Special Provision Act, 2008 whereby the 2nd respondent should be liable to a fine of not less than one half of the value of the loan money or to imprisonment for a term of not less than twelve months.

As for the third ground Mr. Malawa submitted that the late Lucy Mkwema did not adduce any tangible evidence proving that she was married to the 2nd respondent or presented evidence to prove that she contributed to the erection of the suit house. He said the 1st and the 5th respondents clearly showed that the suit house was pledged as collateral by the 2nd respondent and the 4th respondent who was the borrower defaulted in repayment of the loan advanced to him by the 1st respondent. The 5th respondent became the highest bidder and the house was sold by auction to her. For the reasons advanced Mr. Malawa prayed for the appeal to be dismissed or struck out with costs.

The 2nd respondent in his submissions categorically stated that in Exhibit DW3 (the affidavit) he never stated that he had no wife and that his wife had died many years ago. He said the Chairperson put words in his mouth. He submitted that the 1st respondent did not require him to disclose his marital status and the said Exhibit DW3 was prepared by the said 1st respondent and he was only asked to sign. He said that he was not asked about the whereabouts of his wife who then was on short safari to Malawi. He submitted that the late Lucy Mkwema was his wife and the house in question was their matrimonial home at the time of mortgaging it. He prayed for the appeal to be allowed without costs.

The 3rd and 4th respondents did not file their written submissions and therefore the court will only consider the submissions before it that is the submissions of the appellant, the 1st, 2nd and 5th respondents.

I have gone through the record and the submissions by the parties herein and I will consider the grounds of appeal generally.

There is no dispute that the 4th respondent took a loan from the 1st respondent of TZS 4,000,000/= and the guarantor was the 2nd respondent. The security offered according to Exhibit D2 was the suit house. It is also not in dispute that the 4th respondent defaulted in repayment of the loan and the 1st respondent entered into and sold the suit house to the 5th respondent in order to recover its loan. The main issue is whether the suit property was matrimonial property which required the consent of the spouse.

In determining this question, the court has to satisfy itself whether the late Lucy Mkwema and the 2nd respondent are husband and wife. Section 25 of the Law of Marriage Act, CAP 29 RE 2002, provides for the manner in which marriages are contracted in Tanzania. The law recognises civil marriages, religious marriages (those according to the rights of their religion) and customary marriages.

Now was the late Lucy Mkwema married to the 2nd respondent? At the Tribunal the late Lucy Mkwema claimed to be the wife of the 2nd respondent? It is the trite law that he who alleges must prove his allegation. Section 110 (1) of the Evidence Act CAP 6 RE 2002 provides that:

“Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

The late Lucy Mkwema was the only witness at the Tribunal. Though she alleged that she was the wife of the 2nd respondent but there was nothing to support this allegation. As was found by the Tribunal, it was expected that Lucy Mkwema would have brought marriage certificate to confirm the marriage. Or otherwise she would have called a witness who was present at their marriage ceremony or who could explain the life style of the two (Lucy Mkwema and the 2nd respondent) in order to confirm the presumption that the couple were nothing else but husband and wife, but this was not the case.

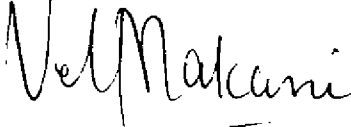
In his submissions filed in court, the 2nd respondent alleged that the late Lucy Mkwema was his wife and when he was making the affidavit he was not asked about his wife's whereabouts. These arguments by the 2nd respondent are an afterthought as they have come too late in time. This story ought to have been said at the Tribunal but the 2nd respondent did not file his defence and the matter proceeded ex-parte against him. The 2nd respondent cannot therefore raise this issue at this appeal stage. Mr. Kipeche for the appellant stated that the evidence that the late Lucy Mkwema was married was not controverted. But with due respect to Mr. Kipeche, as stated herein above, one who alleges has to prove and mere words cannot be taken as proof of marriage. Since there was no evidence at the Tribunal to support the allegation of marriage by the late Lucy Mkwema, it is difficult to safely state and acknowledge that Lucy Mkwema was the wife of the 2nd respondent and I hold as such.

Having established that the late Lucy Mkwema was not the wife of the respondent it goes without saying that the suit house is not a matrimonial property and subsequently no spouse consent is required.

I would also touch on Mr. Kipeche's argument that the Tribunal's reliance of the affidavit was not proper as it did not comply with section 114(2) of the Land Act. He said the affidavit stated that the late Lucy Mkwema was dead while by then it was not true. I have gone through the said affidavit, but it does not reflect that Lucy Mkwema was dead. Under Regulation 4 (1) (c) the Land (Mortgage

Financing) Regulations GN. No. 355 of 2009, the 1st defendant was obliged, to require from the 2nd respondent a declaration that he has no spouse or any other third party in relation to the mortgaged property. The declaration to be by way of affidavit or a witnessed document. I am of the considered view that the 1st respondent adhered to this requirement as the affidavit is clear that the 2nd respondent is the sole owner of the suit house in exclusion of any other person. And considering the evidence apparent on record, that the late Lucy Mkwema was not the 2nd respondent's wife, I am satisfied that prior diligence was taken by the 1st respondent to ascertain that the requirements of the law related to obligations of a mortgagee vis a viz a mortgagor were followed.

In the result, the decision of the Tribunal is hereby upheld, and I accordingly proceed to dismiss the appeal. There shall be no order as to costs.


V.L. MAKANI
JUDGE
23/03/2020