

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 63 OF 2003**

**EXIM BANK (T) LIMITED.....DECREE HOLDER/RESPONDENT  
VERSUS**

**JENGELA TRADING**

**COMPANY LTD.....1<sup>ST</sup> DEFENDANT/JUDGMENT DEBTOR**

**ANYELWISYE M. JENGELA.....2<sup>ND</sup> DEFENDANT/JUDGMENT DEBTOR**

**YERIKO A. JENGELA.....3<sup>RD</sup> DEFENDANT/JUDGMENT DEBTOR**

**LUCY ANYELWISYE JENGELA.....OBJECTOR**

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**RULING**

**KALEGEYA, J:**

Following issuance of a prohibitory order on property situated on Plot No. 869 Block “Y”, Mwakibete Area, Mbeya Municipality, in the name of Anyelwisye Mwakyosi Jengela (2<sup>nd</sup> Judgment – debtor), one Lucy Anyelwisye Jengela, Applicant/objector, surfaced with a chamber summons supported by her own affidavit, praying for orders,

- “(a) That the Honourable Court be pleased make an order of investigation in respect of the attached property on Plot No. 869 Block “Y” Mwakibete Area, within Mbeya Municipality as the said property is a matrimonial property whereby the objector all along did not issue her consent either expressly or implied;*
  
- (b) That the Honourable Court may be pleased to issue an order releasing the property from being attached as the said property is a residential house and therefore is not subject of attachment;*
  
- (c) That the Honourable Court may be pleased to release the property and declare the purported mortgage is void ab initio*

*for lack of the Consent of the Commissioner for Lands or authorized Officer;*

- (d) Costs of this Application be provided for **AND***
- (e) Any other relief(s) that the Honourable Court may deem fit and just.”*

The Applicant/objector is represented by Mr. Tairo, Advocate, while the Respondent is represented by Mr. Mwandambo, Advocate.

The application is resisted with the assistance of two counter – affidavits: one by Mr. Mwandambo and another by Mr. Nsombo. The latter is a Court Broker who effected the prohibitory order.

When submitting in support of their respective stands, the Counsel adopted the relevant affidavit and counter affidavits.

The Applicant/objector impresses that the house which is the subject matter of the controversy is both a matrimonial home and residential adding that in any case there is no mortgage as such as the Commissioner for lands did not give the requisite consent for the disposition. In support thereof, Mr. Tairo vigorously submitted that the Applicant, as the 2<sup>nd</sup> Defendant/judgment – debtor’s wife, did not give her consent to the purported mortgaging of the property – it being matrimonial, relying on s. 59 (1) of The Law of Marriage Act, 1971 and also that as the mortgage was null and void for lack of the Commissioner for Lands’ consent and as the property is residential it can’t be attached. Mr. Tairo made reference to

**Chandrapant vs Mareale [1984] TLR 231 and Nitti Coffee Estates [1988] TLR 203.**

On the other hand, the Respondents submitted that there is no evidence of marriage between the Applicant and 2<sup>nd</sup> Defendant/Judgment debtor hence there is no question of the property being matrimonial; that even if it is found that the Applicant is a legal wife, there was no way the Respondent could have discovered the alleged incumbrance in the absence of a caveat in the land Registry, making reference to **cc 51/2000, Mrs Gretina Mwakyami vs CRDB; cc 101/2001, Juliet Mattaka vs Akiba Commercial Bank & 4 others and (CAT) Civil Appeal No. 59/2000, Ida Mwakalindile vs NBC Holding Corporation Ltd**; that as the present Counsel is the one who represented the 2<sup>nd</sup> Defendant/Judgment – debtor in the main suit the Applicant should be taken to have been aware of the case and proceedings thereof and that therefore acting just now offers no protection due to inordinate delay in terms of O. 21, Rule 57 CPC; that the property in question is not residential as verified by the Court Broker who unchallengedly indicated that it is being used as a school hence inapplicability of s. 48 (1) (e) of the CPC and finally that the question of non registration of the mortgage was raised during the trial but was subsequently abandoned and that in any case the Applicant is a total stranger to the mortgage with no legal right to challenge it.

On the facts and circumstances of this case, with respect to Mr. Tairo, the application cannot succeed.

The main ground fronted by the objector is that the property in question is matrimonial hence protected under s. 59 (1) of The Law of Marriage Act. The said section provides:

*“59. – (1) Where any estate or interest in the matrimonial home is owned by the husband or by the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.*

*(2) Where any person alienates his or her estate or interest in the matrimonial home in contravention of subsection (1), the estate or interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until -*

*(a) the marriage is dissolved; or*

*(b) the court on a decree for separation or an order for maintenance otherwise orders,*

*unless the person acquiring the estate or interest can satisfy the court that he had no notice of the interest of*

*the other spouse and could not by the exercise of reasonable diligence have become aware of it.”*

I will start with the issue regarding the legality of the marriage.

Although Mr. Mwandambo challenges the marriage between the objector and the 2<sup>nd</sup> Defendant/Judgment – debtor, with respect, customary marriages are recognized by the law. The objector having sworn an affidavit showing that their marriage is customary, the Respondent was legally bound to produce challenging evidence above a mere submission that the husband did not swear a supporting affidavit. In my considered view therefore, I am satisfied that they are legally husband and wife.

The above said however, before invoking s. 59 (1) of The Law of Marriage Act, the objector had to prove that the property in question is a matrimonial home. In paragraphs 2 and 3 of her affidavit, the objector states that the said property is matrimonial and that herself, children and family reside therein. And, the Law of Marriage Act, s. 2, defines a “matrimonial home” as follows:

*“the building or part of a building in which the husband and wife ordinarily reside together and includes –*

- (a) where a building and its curtilage are occupied for residential purposes only, that curtilage and any outbuildings thereon; and*
- (b) where a building is on or occupied in conjunction with agricultural 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.”*

Now, on the facts and evidence provided it is as clear as daylight that the property in question is not a matrimonial home. The counter – affidavit of Mr. Nsombo, a Court – broker is very clear on this. The property is being used as a school. Not only did Nsombo so state in his counter – affidavit but also, firmly, and unchallengedly stood by it under heated cross examination by Mr. Tairo who applied for his physical appearance for the purpose.

Mr. Nsombo supported further his statement with photographs of the property in question. If indeed the property in question was matrimonial home/residential, the objector could not have simply left Nsombo’s affidavit to stand. Physical structures are not matters that can easily be hidden. The objector could have easily fronted either, neighbours or even the Mbeya land officer, to challenge Nsombo’s evidence. She did not.

The above disposes the matter as it removes the property from either protections upon which the objector had fronted her application – s. 59 (1) of The Law of Marriage Act (Matrimonial home) and s. 48 (1) (e) of the Civil Procedure Code (Residential house). I find it unnecessary to dwell on the other arguments fronted as they are pegged on what has been disposed of.

For reasons stated, the application stands dismissed with costs.

**L.B. KALEGEYA**  
**JUDGE**

Delivered

**L.B. KALEGEYA**  
**JUDGE**  
**16/11/2004**

**Court:**

Ruling has been delivered in the presence of Mr. Mwandambo. The ruling had been fixed for delivery on 15/11/2004 which turned out to be a public holiday. This could be a reason behind the Objector's absence although the practice is that parties do turn up the next day following a public holiday, as Mr. Mwandambo has done.

The Applicant/objector to be notified of the delivery of the ruling forthwith.

**L.B. KALEGEYA**  
**JUDGE**  
**16/11/2004**

1,441 words

I Certify that this is a true and correct  
of the original/order Judgement Rulling  
Sign [Signature]  
Registrar Commercial Court Dsm.  
Date 16/11/2004