

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**  
**(CORAM: MWARIJA, J.A., MGEYEKWA, J.A. And MLACHA, J.A.)**

**CIVIL APPEAL NO. 335 OF 2020**

**EQUITY BANK ..... 1<sup>ST</sup> APPELLANT**  
**FARAJI K.T ABRI ..... 2<sup>ND</sup> APPELLANT**  
**VIO AND CO LTD ..... 3<sup>RD</sup> APPELLANT**

**VERSUS**

**LUCY MAKETA ..... 1<sup>ST</sup> RESPONDENT**  
**CHOT TRANSPORT CO. LTD ..... 2<sup>ND</sup> RESPONDENT**  
**FRANK BENEDICT MWANUKE ..... 3<sup>RD</sup> RESPONDENT**

**(Appeal against the Judgment and Decree of the High Court of Tanzania,  
Land Division at Dar es Salaam)**

**(Mkuye, J.)**

**dated the 15<sup>th</sup> day of March, 2017**

**in**

**Land Case No. 21 of 2014**

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**JUDGMENT OF THE COURT**

10<sup>th</sup> & 26<sup>th</sup> February, 2025

**MGEYEKWA, J.A.:**

In the High Court of Tanzania, Land Division, the first respondent, Lucy Maketa instituted a suit, Land Case No. 335 of 2020 against the appellants; Equity Bank, Faraji K. Abri and VIO & Company Limited, together with Chot Transport Company Limited and Frank Benedict Mwanuke, the second and third respondents. She sought *inter alia*, an order declaring that the sale by the first appellant to the second appellant,

of a house on Plot No. 25 Block 3 Zone 1A Gangilonga area within Iringa Municipality (the "suit house" or "the property"), was null and void.

The first respondent's case was based on the testimonies of Lucy Maketa (PW1), the first respondent and Agnes Benedict Mwanuke (PW2), supported by one documentary exhibit P1. On the other hand, the appellant's case lay on the testimony of Gilbert Kamugisha (DW1), the first appellant's Public Relationship Manager and Faraj Abri (DW2), the second appellant, supported by an affidavit of the third respondent (exhibit D1).

The facts of this appeal are as follows: On 3<sup>rd</sup> February 2014, the first respondent initiated an action against the appellants, as well as the second and third respondents. She alleged that sometime in the year 2013, the third respondent submitted the title deed of the suit property to the first appellant to secure the loan facility advanced to the second respondent. The first respondent further claimed that the third respondent mortgaged the matrimonial house without her consent. She sought the nullification of both the mortgage and sale transactions concerning the suit property and the costs of the suit.

In opposition thereto, the first and third appellants jointly filed a Written Statement of Defence vehemently denying all the claims raised by the first respondent. They averred that in March, 2013, a loan

agreement was executed between the first appellant and the third respondent pursuant to which the second respondent was granted the sum of USD 20,000 and the loan was secured by the suit house. The first appellant averred that owing to the default, requisite statutory notices were issued to the third respondent who ignored to clear the outstanding arrears, leading to the initiation of debt recovery measures by way of public auction as per advertisement in the newspaper.

It was further averred that the third respondent voluntarily executed an affidavit in compliance with the applicable law prior to the registration of the legal charge instruments. He swore that he was not married, and therefore, the issues of consultation and consent were not relevant. On 28<sup>th</sup> March, 2013, the first appellant disbursed the loan to the second respondent, using the third respondent's title deed as collateral. The appellant further asserted that the second respondent defaulted in servicing the loan and as a result of the default, the first appellant issued the required statutory notices to the second respondent who failed to settle the outstanding arrears. This led to the initiation of debt recovery measures, including a public auction, as advertised in the newspaper. They thus moved for dismissal of the suit.

Having considered the evidence of the first respondent, the appellants, and the written statements of the second and third

respondents, the High Court found; first, that the first respondent was a legal wife of the third respondent, the suit house was a matrimonial property, and that there was no spousal consent. Secondly, relying on the provision of section 59 (1) of the Law of Marriage Act Cap.29 (the LMA), it found that the first respondent had an interest in the suit house. In arriving at this decision, the learned trial Judge relied on section 8 (2) of the Mortgage Financing (Special Provisions) Act, 2008. It observed that the mortgagee should have taken reasonable steps to make a thorough inquiry and verify the mortgagor's marital status with relevant authorities, such as the Registration, Insolvency, and Trusteeship Agency (RITA). It held that, failure to do so constituted a breach of due diligence in fulfilling the mortgagee's duty. Thirdly, that the mortgage of the suit house was without the consent of the first respondent, and thus, the sale of the suit house to the second appellant was null and void. Consequently, the learned trial Judge nullified the sale and ordered the respondents to bear the costs of the suit.

Resenting the decision, the appellant has preferred this appeal upon a memorandum of appeal containing five (5) grounds of appeal as follows:

- 1. The Honourable trial Judge erred both in law and in fact in holding that the 1<sup>st</sup> respondent has interest in the suit land*

*protected by the provision of section 59 (1) of the LMA while there was no any caveat whatsoever registered.*

- 2. The Honourable trial Judge erred both in law and in fact in holding that an affidavit sworn by a mortgagor as to his marital status could not suffice to be through due diligence therefore stretched the law too far and held that the mortgagee ought to have verified with the responsible authorities including RITA.*
- 3. The Honourable trial Judge erred both in law and in fact in failing to answer the 3<sup>d</sup> issue negatively and/or to hold that the 1<sup>st</sup> respondent did not take any step to protect her interest in the mortgaged property, if any,*
- 4. The learned trial Judge erred both in law and in fact in holding that, the mortgage of the suit property and the subsequent sale to the 2<sup>nd</sup> appellant was a nullity.*
- 5. The Honourable trial Judge erred in law and fact in entertaining and determining the suit without assigning reasons for changing judge during trial therefore rendering the proceedings, judgment, and decree null and void for lack of jurisdiction.*

When the appeal was placed before us for hearing, the appellant was represented by Mr. Karoli Vagerian Tarimo, learned advocate. Earlier

on 20<sup>th</sup> November, 2020 after the institution of the appeal, through his counsel, the appellants filed their written submissions in support of the appeal in terms of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The respondents, who were duly served with the notice of hearing, did not enter appearance in Court. However, on 28<sup>th</sup> December, 2020 the first respondent through her counsel filed her reply submissions in compliance with rule 106 (7) of the Rules. Mr. Tarimo beseeched us to invoke the provisions of rule 112 (2) of the Rules and order that the appeal to proceed in the absence of the second and third respondents. We acceded to the prayer and allowed Mr. Tarimo to argue the appeal *ex parte* against the second and third respondents. Before hearing, the learned counsel for the appellants prayed to abandon the fifth ground of appeal. The prayer was granted.

In support of the first ground of appeal, the appellants' counsel argued that the trial court erred in holding that the first respondent had an interest in the suit house under section 59 (1) of the LMA, even though no steps had been taken to protect such an interest or to register a caveat. Mr. Tarimo submitted that the trial court failed to consider that the appellant had taken reasonable steps to obtain the third respondent's affidavit regarding his marital status. The learned counsel argued further that, the first respondent should have registered her interest in the

mortgaged property by way of a caveat, as required by section 59 (1) of the LMA. Since the first respondent did not register her interest in the suit house, she should not be allowed to claim such an interest at the time the mortgage was registered.

According to Mr. Tarimo, the suit house was solely registered in the name of the third respondent. He referred us to section 60 (a) of the LMA and asserted that it is well established that, during the subsistence of a marriage, property acquired in the name of either the husband or the wife is presumed to belong absolutely to that person, unless there is evidence to the contrary. To support his position, Mr. Tarimo cited the decision of this Court in **Hadija Issa Arerary v. Tanzania Postal Bank**, Civil Appeal No. 135 of 2017 [2020] TZCA 217 (11 May 2020), which has been referenced in several other decisions, including **Idda Mwakalindile v. NBC Holding Corporation** (2001) EA 148. He argued that, since the first respondent had not registered her interest in the suit house, there was no way for the first appellant to have known of it, particularly given that the house was solely registered in the name of the third respondent

Submitting on the second and third grounds of appeal, Mr. Tarimo faulted the trial court by holding that an affidavit sworn by a mortgagor regarding his marital status could not constitute sufficient due diligence. He argued that, according to the trial court, the mortgagee should have

verified the mortgagor's status with the relevant authorities. Mr. Tarimo contended that this approach represents an unwarranted extension of the law. He argued that since the third respondent had sworn an affidavit affirming that he was not married, and the suit property was solely registered in his name, the first appellant did not have the obligation of seeking other source of discovering the first respondent's existence.

Submitting further on the contention that the trial court erred in treating the suit house as a matrimonial asset, the appellant's counsel argued that, the mortgagor disclosed his marital status to the first appellant as stipulated under section 114 (2) of the Land Act, Cap 113 (the Land Act). In that context, the learned counsel went on to elaborate that the third respondent had duly deponed an affidavit regarding his marital status, as required by section 114 (3) of the Land Act and regulation 4 of the Land (Mortgage Financing) Regulations, GN No. 355 of 2009. Consequently, the first appellant relied on the third respondent's affidavit and, acting in good faith, disbursed the loan to the second respondent.

With respect to ground four, the learned counsel faulted the trial court for holding that the sale was a nullity. He argued that the sale of the suit property was valid. Elaborating, he argued that the first appellant instructed the third appellant to auction the suit property and sold it after

the second respondent had failed to service the loan. It was his further submission that the sale of suit house was one of the remedies available to the first appellant as a lender to exercise where there was a breach of terms a covenant in a mortgage deed as stipulated under section 125 of the Land Act.

In response to the arguments presented in support of the first ground of appeal, Mr. Mshana defended the trial court's decision, asserting that it was both sound and well-reasoned. It was the learned counsel's argument that the first respondent's interest in the suit property was protected under section 59 (1) of the LMA, despite the property being registered in the name of the third respondent. He emphasized that the mortgaged property was a matrimonial property, in which the first respondent held a legally secured interest.

Regarding the requirement to register a caveat, Mr. Mshana cited sections 8 (2) and (3) of the Mortgage Financing Act which places the responsibility on the mortgagor to disclose information about their spouse. He contended that, under these provisions, the requirement to lodge a caveat is no longer necessary. To support his argument, he referred us to the case of **Hadija Issa Arerary** (supra). In that regard, Mr. Mshana argued that the first appellant had failed to discharge her duty to take reasonable steps to verify whether the third respondent was married or

not. He spiritedly contended that the first appellant's failure to fulfill her legal obligation rendered the mortgage transaction with the second appellant null and void.

On the second ground of appeal, Mr. Mshana argued that, as correctly held by the trial court, a mere affidavit was insufficient to demonstrate thorough due diligence, especially where RITA could prove the existence of the marriage. Mr. Mshana further contended that the mortgagor had a duty to exercise due diligence by verifying the third respondent's marital status with the relevant authority. He further distinguished the case of **Hadija Issa Arerary** (supra), which had been cited by the appellant's counsel, noting that in that case, the mortgagor had not contested the contents of the affidavit. In contrast, in the present case, the mortgagor had explicitly denied the contents of the affidavit in his Written Statement of Defence.

With respect to the third ground of appeal, the learned counsel for the first respondent argued that the trial court was correct in deciding in favour of the first respondent, even though no steps were taken by the respondent to protect her interest in the mortgaged property. To support this argument, he cited section 59 (1) of the LMA and contended that the lodging of a caveat is no longer a legal requirement. He cited the case of **Hadija Issa Arerary** (supra) and further emphasized, based on the

evidence of PW1 and PW2, that the first respondent had no knowledge of the existence of the mortgage, which would have prompted her to take action before the mortgage was created.

On the last ground, Mr. Mshana robustly argued that the procedure for the sale of mortgaged property was not followed. He contended that the evidence on record reveals that the sale of the suit house took place within two days, from the date of publication to the date of auction. He strongly asserted that no evidence was presented at the trial to prove that the required 14 days public notice was issued to the mortgagor, as mandated by law.

We have evaluated the grounds in support of and against the appeal. This appeal will stand or fall on two issues, first, whether the appellant had taken due diligence in protecting spousal interest before it accepted the suit house as a collateral for the loan. The second issue is whether the sale of the suit house was proper. We shall begin our discussion by first making observations with respect to the first, second and third grounds of appeal. It is clear to us that the crux of the first respondent's grievance is that the suit property could not have been mortgaged because it was a matrimonial property in which her consent was to be sought and obtained.

We share the undisputed assertion by both learned counsel that,

the provision governing the procedure for mortgaging a landed property falls under the Land Act and the Mortgage Financing Act. Prior to the amendment of section 114 of the Land Act which was effected through section 8 (2) and (3) of the Mortgage Financing Act, the duty was imposed on the mortgagee under section 59 (1) of the LMA compelling any party who had an interest over a property to be mortgaged to register a caveat to preserve his/her interest.

The first respondent's primary complaint is that the suit property should not have been mortgaged, as it was matrimonial property, and her consent was required. In the present case, it is not in dispute that the mortgagor submitted an affidavit (exhibit D1) affirming his single status. Based on the third respondent's affidavit, the mortgagee had no valid grounds to doubt its veracity. Relying on this information, which the first appellant sincerely believed to be accurate, the loan was disbursed to the second respondent.

The appellants' counsel argument is that the mortgage was proper in law while the first respondent's counsel concurs with the trial court's decision that the transfer of mortgage was improper. Prior to the amendment of section 114 of the Land Act, which was effected through section 8 (2) and (3) of the Mortgage Financing Act, the responsibility was placed on the mortgagee under section 59 (1) of the LMA, requiring any

party with an interest in the property to be mortgaged to register a caveat to protect their interest. However, as correctly submitted by Mr. Mshana, following the amendment, the lodging of a caveat is no longer a legal requirement, as per section 8 (2) and (3) of the Mortgage Financing Act. These provisions place the responsibility on the mortgagor to disclose information regarding the spouse. For ease of reference, section 8 of the Mortgage Financing Act reads as follows:

*"... it shall be the responsibility of the mortgagor to disclose that he has a spouse or not and upon such disclosure the mortgagee shall be under the responsibility to take reasonable steps to verify whether the applicant for a mortgage has or does not have a spouse."*

This matter is not novel. Confronted with an akin situation in the case of **Hadija Issa Arerary** (supra) referred to us by the appellant, the Court had the occasion of interpreting the relevant provisions: It stated that:

*"Prior to the amendment of section 114 of the Land Act which was effected through section 8 (2) (3) of the Mortgage Financing Act, the duty was imposed on the mortgagee under section 59 (1) of the LMA compelling any party who had an interest over a property to be mortgaged to*

*register a caveat so as to preserve his/her interest. After the amendment, the lodging of a caveat is no longer a requirement of the law as per section 8 (2) (3) of the Mortgage Financing Act which has shouldered the responsibility to the mortgagor **to disclose the information of the spouse.**"*

[Emphasize added]

The impetus which came up by the advent of section 8 (2) (3) of the Mortgage Financing Act, shifted the burden of disclosing spousal information to the mortgagor to be so inquired by the mortgagee. That is the position of the law as far as the issue of disclosure is concerned. However, as rightly submitted by the learned counsel for the appellants, in the case of **Hadija Issa Arerary** (supra), the Court addressed situations where spousal consent may not be explicitly obtained. The Court held that if the mortgagor provides an affidavit declaring his/her marital status as single, and the mortgagee takes reasonable steps to verify this information, the mortgage can be considered valid even without explicit spousal consent. The Court emphasized that the mortgagee is not required to conduct an exhaustive investigation into the mortgagor's marital status but must take reasonable steps to ascertain it.

In the present case, the mortgagor deponed an affidavit to express his marital status as required by regulation 4 (1) (c) of the Land

(Mortgage) Regulations, 2005 which prescribes clearly how such extra due diligence should be carried out by the mortgagee precisely. Such information must be obtained from the mortgagor who is required to depone an affidavit to express his marital status. For easy of reference regulation 4 (1) (c) of the Land (Mortgage) Regulations, 2005 provides:

*"If the applicant states he or she is not married and the mortgagee has reason to believe that, the statement might be incorrect, the mortgagee may require the applicant to produce an affidavit to the effect that the applicant is not married."*

Relying on the aforementioned regulation, we find that the first appellant took reasonable steps to verify the matter and, accordingly, acted in reliance of the third respondent's affidavit, which was sufficient to validate the mortgage without the explicit consent of the first respondent. It is important to emphasize that the purpose of the law is to strike a balance between safeguarding matrimonial rights and ensuring the operational efficiency of financial institutions, thereby preventing undue burdens on such institutions in the disbursement of loans.

Given the circumstances of this case, we are at one with Mr. Tarimo that there was no reason that could have prevented the first appellant from disbursing the loan based on the third respondent's affidavit. We,

therefore, do not subscribe to the findings of the trial court, the requirement for verification of the third respondent's marital status with RITA was an undue extension of the first appellant's obligations. Therefore, the first, second and third grounds of appeal have merits and we thus allow them.

We need not dwell extensively on the issue raised by the learned counsel for the parties regarding the fourth ground of appeal on whether the sale of mortgaged property was proper. As intimated earlier, the third respondent executed an affidavit stating that he was not married, thus confirming the validity of the mortgage. Consequently, the first respondent was not a party to the mortgage deed and, therefore, not involved in the mortgage transaction. In this context, the first respondent had no *locus standi* to challenge the sale of the mortgaged property, as she was not a party to the transaction. The appropriate party to contest the sale would have been the mortgagor.

For the aforesaid reasons, we find and hold that, since the first respondent had failed to contest the legality of her interest, the mortgagee's duty to conduct the transaction lawfully was sufficient to validate the mortgage. Had the trial court considered that, the third respondent's affidavit was sufficient to validate the mortgage, it could have found that the first respondent had no *locus standi* to challenge the

sale of the suit property and solely ended in determining the first issue. Consequently, we find that the sale should not have been nullified. Thus, the fourth ground of appeal is devoid of merit.

In the event, we allow the appeal and set aside the resultant decree. Given the circumstances of the case, we make no order as to costs.

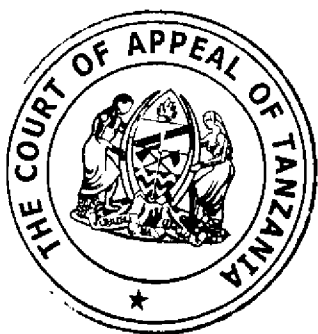
**DATED at DAR ES SALAAM** this 25<sup>th</sup> day of February, 2025.

A. G. MWARIJA  
**JUSTICE OF APPEAL**

A. Z. MGEYEKWA  
**JUSTICE OF APPEAL**

L. M. MLACHA  
**JUSTICE OF APPEAL**

The Judgement delivered this 26<sup>th</sup> day of February, 2025 in the presence of Mr. Karoli Varelian Tarimo learned counsel for the Appellants and in absence of the Respondents, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "J. E. Fovo", is written over a large, light-colored oval shape that serves as a background for the signature.

J. E. FOVO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**