In Civil Appeal Number 68 of 1998 between *Ndwaty Philemon Ole Saibul* and *Solomon Ole Saibul* (unreported), the decree was also signed by the Registrar and not the judge who decided the appeal. The decree was found to be invalid and the appeal was incompetent and struck out for that reason. We should point out here that in *Mugo's* case, the decree was under Order XXXIX, rule 35(4), it was a first appeal whereas in *Saibull's* case, it was a second appeal originating from a decision of a Primary Court. In *Saibul's* case the court stated thus:

> The requirement that a decree must be signed by the judge who made the decision is rooted in sound reason, namely, that the judge who decided the case or appeal is in the best position to ensure that the decree has been drawn in accordance with the judgment.

With respect, the same reasoning applies to decrees under Order XX, rule 7. As explained before, we are of the firm view that since Order XX, rule 7 specifically authorizes a judge to sign a decree, the Deputy Registrar was not competent to sign the decree herein. We construe Order XX, rule 7 as being mandatory. In case the judge concerned was not available, then Order XX, rule 8 would come into play and such decree will be signed a successor judge. Our inevitable conclusion therefore is that the decree on page 130 of the record of appeal is invalid. It is for these reasons that we ordered that the appeal be struck out with costs.

In both (CAT) Civil Appeal Number 2 of 1990 and Civil Appeal Number 68 of 1998, the court struck out the respective appeals but permitted the appellants, if they so desired, to re-institute the appeals to this court. The rationale for so doing is perhaps best captured in the following passage in Civil Appeal Number 2 of 1990 which reads as under:

> But bearing in mind the fact that practically all the judges of the High Court have consistently omitted to comply with the requirements of Order 39, rule 35(4), and that the Court of Appeal has also consistently until now failed to notice this omission since it was established over ten years ago, thereby encouraging members of the legal profession to believe that all was in order with the decree in appeal, we think justice demands that the appellant be put in a position to re-institute his appeal easily in this court should he so wish.

We respectively subscribe to these reasons. *Mugo's* case was a wake-up call. We wish to remind all concerned that decrees should be signed according to law. In the result, we direct that the appellant be put in a position whereby he can easily re-institute his appeal in this court if he so desires within fourteen days from the date of obtaining the decree from the High Court. We order accordingly.

SAMWEL OLUNG'A IGOGO AND TWO OTHERS *v.* SOCIAL ACTION TRUST FUND AND OTHERS

HIGH COURT OF TANZANIA
(Commercial Division)
AT DAR ES SALAAM

COMMERCIAL CASE No. 3 OF 2004

Family Law – Marriage – Acquisition of property by a spouse during the subsistence of marriage – Rebuttable presumption of exclusive ownership by the spouse acquiring the property – Section 60 of the Law of Marriage Act 1971.

Family Law – Matrimonial home – Matrimonial home defined – Section 2(1) of the Law of Marriage Act 1971.

Land Law – Mortgages – Mortagage of property which is a matrimonial home – Consent of spouse of the other spouse is required – Sections 59 of the Law of Marriage Act 1971 and 112(3) of the Land Act 1999.

Land Law – Mortgages – Absence of name of spouse on title deed of the mortgaged property – Effect thereof – Section 161(1) and (2) of the Land Act 1999.

Land Law – Mortgages – Duty of lender to inquire whether consent of the other spouse is obtainied – Effect of lack of such consent.

On 7 August 2002 the first respondent extended a TZS. 100 000 000 loan facility to the second respondent, Trade Goods Limited, which was secured by legal mortgage over rights of occupancy numbered 25617, 49840 and 186252/82 in the names of Joseph Ndege, Mfaume Abdalla Kitimbi and Imani Elinda Msham respectively. The loan was not serviced as required and on 31 January 2004 the first respondent instituted a suit for recovery of a total liability of TZS. 129 084 972-37 and for sale of the mortgaged property and further interest at court rate. The matter was settled through mediation by which the total sum of TZS. 134 986 040 was to be paid by instalments, the last being on 31 March 2005. There was a default clause entitling the first respondent to execute the decree including disposal of charged assets in the debenture and mortgaged properties. When the mortgaged properties were attached in execution proceedings, three objectors filed objection proceedings. The first objector said that he had never been a party to the proceedings and his property should not have been attached, that he had bought the property from Iddi, son of Joseph Ndege, the registed owner of the property who died in 1993 and so could never have executed the guarantee annexed to the plaint. The second objector, Rukia said she was the wife of Kitimbi, the fourth respondent, while Ruth, the third objector, said she was the wife of Masham, the fifth respondent; in their objection they said the attached properties were matrimonial homes and that they had not given their consent, as spouses, to the mortgages. Rukia claimed that she had given a lump sum of TZS. 3 500 000 to her husband as part of the purchase price of the property which was paid for in three instalments. Ruth, on the other hand, said she had contributed TZS. 9 000 000 towards the purchase price of TZS. 15 000 000 although her husband said he was able to contribute more than Ruth because he was Director of Civil Aviation while she was a teacher.

Held: (i) The title deed of the plots which are the subject matter of the objections by the second and third objectors are in the names of their husbands only and so the properties belong absolutely to their respective husbands; however the properties are matrimonial homes as they are occupied by the two objectors and their husbands;

(ii) A lender is now required not only to conduct a search in the Land Registry but also has a duty to make inquiries whether the borrower's spouse has consented to the mortgage;

(iii) The mortgage of a matrimonial home will only be valid if any document or form used in applying for such mortgage is signed or there is evidence from the document that it has been asserted to, by the spouse of the borrower living in the matrimonial home.

(iv) In the present matter the mortgages by the fourth and fifth respondents were not valid as they were not consented to by the respective spouses.

Objections allowed

Cases referred to:

(1) *Idda Mwakalindile v. National Bank of Commerce,* CAT – MBY – Civil Appeal Number 59 of 2000

Statutory provisions referred to:

(1) The Law of Marriage Act 1971, sections 2(1), 59 and 60.

(2) The Land Law Act 1999, sections 112 (3), 161(1), 118 and (2).

Mr Ogunga, for the first Objector

Mr Ntonge, for the second and third Objector

Ms Shio, for the first Respondent (Decree Holder)

RULING

(Dated 22 February 2005)

Kalegeya, J.: I should start by making an observation on the titling of parties. Throughout the documentations filed subsequent to Igogo's application, Rukia and Ruth have been indicated as being first and second objectors/applicants, respectively. However, as Igogo filed the objection first, for consistency in this ruling, I have entitled him first objector to go with the sequence of their respective knocking at this court's door. Rukia and Ruth are entitled, second and third objector accordingly.

On 7 August 2002, the plaintiffs and the first defendants executed a loan agreement by which the former extended a TZS. 100 000 000 loan facility to the latter. The said loan, among others, was secured by legal mortgages over the rights of occupancy numbers 25617, 49840 and 186252/82 in the names of Joseph Ndiege, second defendant, Mfaume Abdallah Kitimbu third defendant and Imani Elikunda Msham, fourth defendant respectively. The facility was not serviced as required. By 30 January 2004, when this action was instituted, the total liability, inclusive of the principal sum and interest, had reached TZS. 129 084 972-37. The plaintiffs then sued for recovery of the said amount; sale of mortgage properties, further interest at court rate and costs.

On 2 April 2004, the matter was settled through mediation as per terms of the following consent settlement order,

1. That the Plaintiff is entitled to payment of TZS. 134 986 040 by the defendant as of today, 2 April 2004.The said sum is inclusive of the principal sum and accrued interest.
2. That the defendant shall pay the said sum in four installments of TZS. 50 million by 30 June 2004; TZS. 40 million by 30 September 2004; TZS. 30 million by 31 December 2004 and TZS. 14 986 040 by 31 March 2005.
3. That the defendant shall pay the costs on the very date the last instalment is paid
4. That in the invent of default on any of the instalments the Plaintiff to execute the decree including disposal of charged assets in the debenture and mortgage properties in terms of the Loan Agreement.

The defendant having decided to stand miles away from the said consent order, in September 2004, the plaintiffs/decree – holders successfully applied for execution by attaching the mortgage properties.

Attachment warrants jolted Igogo the first objector, Rukia, the second objector and Ruth, the third objector, into action by filing

objection proceedings. Rukia and Ruth charged that they are Kitimbu and Masham's wives respectively; that they have doubled edged interests in the properties – as matrimonial property and matrimonial home, and further that as they did not give their consent to their being mortgaged, the attachment warrants against the said properties should be raised. On the other hand, Igogo urged that he had never been a party to the mortgaging transaction of his house and that therefore it cannot be subjected of attachment in the present transaction.

Mr Ntonge, Advocate, appeared for Ms Rukia and Ruth, the second and third objectors, while Mr Ogunda and Ms. Shio, Advocates appeared for the first objector and respondent/decree – holder respectively.

In my investigations, apart from submissions by Counsel and affidavit by deponents, the latter were also subjected to cross examination.

Starting with Igogo's objection, while I sympathise with the Decree–holders, the obvious is that the application has to be allowed. Notwithstanding Ms Shio's determined cross examination, the investigation has revealed the following.

Joseph Ndiege (not Ndege), the owner of Plot Number 551, Block A part II, Tabata Area, Dar es salaam with titled deed number 25617 died in 1993.

How the deceased's property came to enter the saga, Igogo unchallengedly stated that Iddi, his son, sold the plot to him; that the purchase price was TZS. 1 000 000 but only TZS. 500 000 has so far been paid; that the TZS. 500 000 was paid in two installments of TZS. 300 000 and TZS. 200 000; that Iddi has refused to receive the balance and has instead filed a case at Kisutu Resident Magistrates' Court challenging the sale.

Notwithstanding his death, the Mortgage Deed and the Guarantee and Indemnity Deeds attached to plaint show that these were executed by Joseph Ndiege in person, in August 2002, almost ten years after his death! The obvious is that the said documents were executed by a fictitious person who posed as Joseph Ndiege. This criminal act can in no way encumber the disputed property because, even if Igogo/Iddi dispute did not exist, the said Iddi himself could not have mortgaged it without changing the title into his name first, as a legal personal representative of the deceased. The criminal doors are not closed: the lender can proceed against whoever played the rough illegal game.

Turning to Rukia and Ruth, although in their oral narrations under cross examination, expanding on their respective affidavits, they tried tooth to nail to show that the properties in question are both matrimonial property and matrimonial homes, I was not convinced of the former. Rukia stated that she contributed TZS. 3 500 000 towards the purchase price but this was just a flat allegation. She insisted that she gave the said sum to her husband and yet urged,

> The house was bought in ... installment ...one million and then 2 million. The balance was paid later and on their understandings (meaning buyer and her husband). She added however that she gave her husband the TZS. 3 500 000 in lumpsum but never made a follow up of its utility!

Although in marriage relations most matters transpire without records, in situation like these, where both husband and wife are fighting to save their roof under – whatever costs, courts have to be very careful with mere flat allegations. More evidence than mere allegations in affidavits or just oral responses under cross examination should be adduced to establish the joint ownership. I am thus not convinced of Rukia's alleged joint contribution towards the purchase of the dispute property.

Same approach and reasoning applies to Ruth who stated that she contributed more – TZS. 9 000 000 out of TZS. 15 000 000 allegedly put into that property, contradicting Masham who said that he contributed more as he was Director of Civil Aviation with more earnings while Ruth was a teacher.

I should pose here and observe that I am quite aware of current law that domestic and related duties performed by wives are recognized as due contributions towards matrimonial properties. But Ruth and Rukia, employees, have not approached the issue from that angle.

And, I should add that not every property acquired during the subsistence of the marriage is joint property as between the husband and wife. Each of the two can acquire his or her own property and it will remain recognized as such. section 60 of The Law of Marriage Act has the following:

> 60. Where during the subsistence of a marriage, any property is acquired:
>
> (a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;
>
> (b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.

Treading on the above analysis, as the titles are only in Kitimbu's and Masham's names and so no joint interests were entered in the land Register by Rukia and Ruth and as they have not proved up to the standard required of any joint contribution, their flat claims of joint ownership stand dismissed.

What about the second leg – matrimonial home? On this, I have been satisfied that indeed the properties are. That they are wives, legally, has not been challenged. So is their occupation of the said premises – that is where the families reside.

The Law of Marriage Act, section 2(1) defines *"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 residential purposes only, that curtilage and any outbuildings thereon ...

As regard whether the wives were notified of the mortgaging transactions by the husbands, the latter maintain that they didn't. Again, here, both the husbands and wives may be employing that stand in order to save the matrimonial homes. The wives may have been informed of the transactions but in the absence of any other evidence the allegations stand unchallenged. What is obvious however is that there is no consent by either Rukia or Ruth.

The second and third objectors urge, making reference to section 59 of The Law of Marriage Act, that the properties could not be encumbered without their consents and so is the case under section 112(3) of the Land Act 1999, and that lack of spouses' names on the titles do not bar recognition of their interests (section 161(1), (2) of the Land Act).

The first respondent launched a challenge by making reference to *Idda Mwakalindile v. NBC,* insisting that there is no way the respondents could have known of the existence of the interests.

Section 59 of The Law of Marriage Act (1971) has the following:

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 titled to land or of deeds.

(2) Where any person alienates his or her state 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.

On the other hand, section112 (3) of The Land Act 1999 provides:

A mortgage of a matrimonial home, including a customary mortgage of a matrimonial home shall be valid only if -

(a) any document or form used in applying for such a mortgage is signed by or there is evidence from the document that it has been assented to by the borrower and any spouse of the borrower living in that matrimonial home;

(b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the borrower living in that matrimonial home ..."

The said Land Act, under s.ection 161 goes further to provide:

161(1)Where a spouše obtains land under a right of occupancy for the co – occupation and use of both spouses or where there is more than one wife, all spouse, there shall be a presumption that, unless a provision in the certificate of occupancy clearly states that one spouse is taking the right of occupancy in his or her name only or that the spouses are taking the land as occupiers in common, the spouses will hold the land as occupiers in common and, unless the presumption is rebutted in the manner stated in this subsection the Registrar shall register the spouses as occupiers in common.

(2) Where land held for a right of occupancy is held in the name of one spouse only but the other spouse or spouses contributed by their labour to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of the labour to have acquired an interest in that nature of an occupancy in common of that land with the spouse in whose name the certificate of occupancy or customary certificate of occupancy has been registered.

(3) Where a spouse who holds land or a dwelling house for a right of occupancy in his or her name alone undertake a right to disposing for that land or dwelling house, then:

(a) where that disposition is a mortgage, the lender shall be under a duty to make inquiries of the borrower **has or as the case** may be, have consented to that mortgage in accordance with the provisions of section 59 of the Law of Marriage Act 1971;

(b) where that disposing is an assignment or a transfer of land, the assignee or transferee shall be under a duty to make inquiries of the assignor or transferor as to whether the spouse or spouses have consented to that assignment or transfer in accordance with section 59 of the Law of Marriage Act 1971,

and where the aforesaid spouse undertaking the disposition deliberately misleads the lender or, as the case may be, the assignee or transferee as to answers to the inquiries made in accordance with paragraph (a) and (b), the disposition shall be voidable at the option of the spouse who have not consented to the disposition.

Now, applying the Law of Marriage Act and the Land Act on the facts at hand, again with regrets to the decree – holders who have parted with their money on seemingly bogus securities, the said laws are not in their favour.

While I appreciate that under section 59(2) of the Law of Marriage Act lack of a spouse's consent to a Mortgage where the lender could not have possibly discovered the spouse's interest does not take away the said lender's recovery rights as held by the Court of Appeal of Tanzania in *Mwakalindile's* case, I should hastily add that sections 112 and 161 of the Land Act quoted above have now taken away that levellage.

The mortgage documents were never signed by either Rukia or Ruth nor is there evidence on the face of the documents that they assented as required by section112 (1). This alone makes the mortgage documents invalid.

The transactions sustain another fatal blow under section 161 of the same Land Act.

I consider section 161(1) to be inapplicable because there is no evidence that in obtaining the respective rights of occupancy, Kitimbu

and Masham did so for the **occupation and use** with their spouses. The intention under this provision should not be assumed. It should be proved.

Neither is section 161(2) applicable because, as earlier on held, the wives' contributions have not been established.

Under section 161(3) (a) however the lenders are aptly netted. The buoyance they enjoyed under section 59(2) of the Law of Marriage Act is taken away. They are duty bound to inquire of existence of the spouse's consent or otherwise (although the version of the Act I have, seems to have some words missing in that subsection 161 (3) (a)).

Under section 59(2) of the law of Marriage Act, lenders could simply urge that there was no way they could have been aware of the existence of the spouse's interest as they did not see any incumbrance in the Land Register upon due search. I am satisfied that this was the line of reasoning adopted by the Court of Appeal in *Mwakalindile's* case.

The Court of Appeal did not deal with the provisions of the Land Act in question and I think primarily because it had not effectively been put into operation although legally, as per commencement date, it was.

Now however, search in the Land Register alone is not enough. The lender has to go further and inquire about the existence of spouse and inquire whether due consent has been secured.

And, I should hurriedly add that the provisions of the Land Act on this do not contradict section 59 of the Law of Marriage Act. They simply supplement. But even if they had contradictory elements, section181 of the Land Act provides the cure. The said section states,

181. On and after the commencement of this Act, notwithstanding any other written law to the contrary, this Act shall apply to all land in Mainland Tanzania and any provisions of any other written law applicable to land which conflict or are inconsistent with any of the provisions of this Act shall to the extent of th