

IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., BWANA, J.A., And MJASIRI, J.A.)

CIVIL REVISION NO. 8 OF 2010

MS. SYKES INSURANCE  
CONSULTANTS CO. LTD.....PLAINTIFF/DECREE HOLDER

VERSUS

MS. SAM CONSTRUCTION CO. LTD..... DEFENDANT/JUDGEMENT DEBTOR

(Revision from the decision of the High Court of Tanzania  
at Dar es Salaam)

(Mwaikuqile, J.)

dated the 14<sup>th</sup> day of June, 2010  
in

Civil Case No. 293 of 2000

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ORDER OF THE COURT

**RUTAKANGWA, J.A.:**

These *suo motu* revision proceedings were prompted by a complaint of Anna Lawrence Mhina and Samwell George Mhina, who are wife and husband respectively. The gist of the complaint is that their residential house and/or matrimonial house situate on Plot No. 137, Block 'D' Sinza, Dar es Salaam, was illegally attached and sold in execution of a court decree, which was essentially not against them. For one to appreciate fully

the merits or otherwise of the complaint, the following background is essential.

On 9<sup>th</sup> August, 2000, M/S Sykes Insurance Consultants Co. Ltd, instituted a suit against M/S Sam Construction Co. Ltd in the High Court of Tanzania, at Dar es Salaam. The claim was for Tshs 28,040,415/=, interests and costs. On 29<sup>th</sup> June, 2009, the trial High Court entered judgment for the plaintiff as prayed.

As the judgment-debtor apparently failed to pay the decretal amount on its own, the decree-holder proceeded under Order XXI, Rule 11 of the Civil Procedure Code, Cap. 33. (hereinafter the C.P.C.), to apply for execution of the decree in its favour. This was on 29<sup>th</sup> August, 2009. The preferred mode of execution was "*ATTACHMENT AND SALE OF A HOUSE on PLOT 137/D SINZA, KINONDONI DISTRICT*". Consequently the trial High Court on 7<sup>th</sup> October, 2009 ordered as follows:-

**Order:** Let the Execution Proceed accordingly."

Pursuant to the above order, on 27<sup>th</sup> October, 2009 the Registrar issued a warrant of attachment to M/S Rhino Auction Mart Co. Ltd, Court Brokers. By this warrant, the Court Broker was commanded to:-

*"... attach the movable property of the said defendant as set forth in the schedule hereto ... unless the said defendant shall pay to you the sum of shs 58,814,770.25 now due, as further noted on the back hereof ..."*

Curiously, the Court Broker was commanded to return the warrant by the **19<sup>th</sup> day of October, 2009**. Furthermore, the property to be attached, be it movable or immovable, was not specified on the said warrant, but only the sum due.

Notwithstanding the above deficiency, the Court Broker, on 2<sup>nd</sup> November, 2009 apparently **attached** a house on Plot No. 137/D situated at Sinza area in execution of the decree. On 3<sup>rd</sup> December, 2009, the Decree –holder formally applied under 0.21 rule 65 (3) of the C.P.C to have the attached house sold on a public auction. The application was made **ex parte**.

While the execution proceedings were in progress, Anna L. Mhina, on 15<sup>th</sup> February, 2010 filed objection proceedings in the trial High Court. This was done under Rules 57 (1) and (2), 58 and 59 of the C.P.C. The High

Court was moved to investigate her claim to the effect that the attached house which was due for sale did not belong to the judgment – debtor (M/S SAM CONSTRUCTION CO. LTD). She was contending in the affidavit in support of the Chamber Summons, that the attached house was a matrimonial house in which herself as well as her husband and their family were residing. We have found it apposite to point out here that the objection proceedings were preferred under a ***certificate of urgency***. All the same, no immediate action was taken.

On 2<sup>nd</sup> March, 2010, Mr. Mgare, learned advocate for the Decree-holder appeared before Mwaikugile, J. for the hearing, ***ex parte***, of their application under rule 65 (3), of the C.P.C. After hearing Mr. Mgare, the High Court ordered the *"house on Plot No. 137 Block D, Sinza Kinondoni District be sold by Public Auction"*.

Subsequent to the order of sale, on the following day and before the house was sold, Anna Mhina's objection proceedings application was brought before Mwaikugile, J. The learned judge declined to entertain it as "it had been overtaken by event." The house was subsequently sold on 18<sup>th</sup> July, 2010. This action aggrieved the objector (Anna Mhina), for her

objection proceedings application was yet to be determined, and hence these revision proceedings.

In our desire to arrive at a conclusive determination of these proceedings, we have found ourselves constrained to resolve, first, this pertinent issue: have we the jurisdiction to entertain these proceedings? For a satisfactory answer, we had first of all to look at the Appellate Jurisdiction Act, Cap 141 [henceforth the Act]. We got the answer in section 4 of the Act.

Section 4 of the Act provides thus in subsection 3:

*“Without prejudice to subsection (2), the Court shall have power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings in the High Court”.*

Elucidating on the powers of revision conferred upon the Court by the said section 4, this Court pertinently observed as follows in the case of

**CITIBANK      TANZANIA      LIMITED      VS      TANZANIA**

**TELECOMMUNICATIONS CO. LTD AND 4 OTHERS, CIVIL**

APPLICATION NO. 64 OF 2003 (unreported):-

*"Subsections (2) and (3) above deal with different situations under which the Court can be seized with revisional jurisdiction. The revisional jurisdiction in subsection (2) is exercised either in the course of hearing an appeal or incidental to an appeal whereas subsection (3) enables the Court to call for and examine the record of any proceedings before the High Court for satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings in the High Court. (see: Transport Equipment Ltd v. Deuram P. Valambhia (1995)TLR 16; Civil Application No. 84 of 1999 between Halima Hassan Marealle and (1) Parastatal Sector Reform Commission (2) Tanzania Gemstone Industries Limited (unreported)."*

We would like to observe further that in proceeding under section 4 (3), the Court may be moved either formally by notice of motion or informally in writing or orally, as Mrs. Anna Mhina did in this case, whereby it acts on its own motion. This may be done by any party to the impugned proceedings and/or any person adversely affected by any order or finding made in those proceedings. Mrs. Anna Mhina, not a party in the original suit but a party in the shelved objection proceedings, believes to have been adversely affected by the attachment and sale of what she claims to be their matrimonial – cum – residential house. In view of this we are

satisfied that we have the jurisdiction to entertain and determine these proceedings.

Rule 65 (6) of the Tanzania Court of Appeal Rules, 2009 (the Rules) provides that where the Court initiates such proceedings on its own accord it *"shall have the discretion to summon parties and shall grant the parties an opportunity to address the Court"*. In these proceedings, we heard brief submissions from Mr. Moses Kaluwa, learned advocate for Mrs. Anna Mhina and Mr. Francis Mgare, learned advocate for M/s Sykes Insurance Consultants Co. Ltd.

Mr. Kaluwa urged us to invoke the Court's revisional powers to quash and set aside the execution proceedings in the High Court, which led to the attachment and sale of his client's house. He predicated this prayer on his contention that those proceedings were fraught with material irregularities and patent illegalities which rendered the said attachment and sale of the house a nullity. He pointed out the illegalities to be the sale of the house which was not the property of the judgment-debtor and this was done when there was pending in the same High Court objection proceedings in respect of the said house.

On his part, Mr. Mgare pressed us to uphold the entire execution proceedings as there was neither impropriety, irregularity nor any illegality in the entire execution process. While admitting that Mrs. Mhina's objection to attachment application was pending when the sale order was made, he contended that the executing court was not to blame as the said application was brought to the attention of the learned judge after he had ordered the sale of the house.

We shall start by looking at the laws governing executions of decrees and/or orders in this country. We have two principal pieces of legislations. These are the C.P.C and the Court Brokers and Process Servers (Appointments, Remuneration and Discipline) Rules, 1997 (G.N. No. 315 of 1997 as amended by G.N. No. 763 of 1997) or the Court Brokers Rules hereinafter. The relevant provisions of the C.P.C. are sections 31 to 55 and Order 21.

We have read carefully the relevant provisions of the above two legislations. We cannot refrain from observing that they are as elaborate as they comprehensible. We think this was deliberately done as execution of court decrees and orders is an essential component of the administration of civil justice. Indeed, it is its culmination and demands a high degree of



meticulousness, efficiency, transparency and discipline from all who are entrusted with the power and authority to carry out this duty. This is all because as Lord Denning said in the case of *Re OVERSEAS AVIATION ENGINEERING (GB) LTD* (1962) 3 ALL E.R. 12, at page 16, execution is the final "*process for enforcing or giving effect of the judgment of the Court*".

The formal execution process of court orders and decrees under the C.P.C begins with the decree-holder applying to the court which passed the decree or to which the decrees is sent or such officer appointed by the court in this behalf, for its execution in one of the fives specified modes: see section 42 and 0.21, R. 9 of the C.P.C. The court should always be moved and cannot act *suo motu*.

Every written application for execution must conform with the mandatory requirements set out in 0.21 rules 10 and 11, as well as rule 12 in respect of immovable property. On being satisfied with full compliance with these mandatory provisions, the executing court should admit the application and then proceed under 0.21, r. 15 (4) to order execution of the decree according to the nature of the application. As far as these proceedings are concerned, our study of the High Court's original record

has satisfied us that all these preliminary and mandatory requirements, had been complied with by both the decree-holder and the executing court.

Commenting on Order 21 r. 17 (4), of the Indian Code of Civil Procedure, 1908 which is identical with our O.21, r. 15 (4), SOONAVALA, R.K, in his invaluable **"TREATISE ON THE LAW OF EXECUTION PROCEEDINGS"**, says thus at page 820:-

" ...*If* the application conforms to the requirements of rules 11-14 it must be admitted and comes on in the usual course in open court for the orders of the judge.

If the application is not in anyway defective the Court shall order execution of the decree according to the nature of the application. No enquiry as to whether the property sought to be proceeded against belongs to the judgment – debtor, is contemplated under the rule before execution can be ordered. If the decree – holder states that he desires to execute the decree against the person of the judgment – debtor, his request cannot be refused on the ground that he must first proceed against the property of the judgment-debtor..." [Emphasis is ours].

We fully subscribe to all this. We also hasten to add that sub-rule (4) casts a mandatory duty on the court to make a specific order for the

execution of the decree in the mode applied for. In our considered view, it is this formal order which forms the legal basis for the issuance of, say, a garnishee order, warrant of attachment of movable property, prohibitory order, etc, under rule 22.

It is a mandatory requirement under rule 22 (2) and (3), that every such process shall bear the date of the day on which it was issued, be signed by the judge/magistrate, be sealed with the seal of the court and **shall specify the day on or before which it shall be executed.** The learned MULLA, in his MULLA ON THE CODE OF CIVIL PROCEDURE, ACT NO. V OF 1908, 15<sup>th</sup> ED. VOL. II, at page 1679 says that the provisions of Order 21, rule 24 must be strictly complied with and omission, for example, to put a court seal on the warrant **renders the attachment illegal.** However, as was held in the case of **ATTORNEY GENERAL V. KATOO C. SATOH** [1960] E.A. 505 (T), stamping a rubber stamp is sufficient compliance with the requirement of sealing an order with a court seal. It will be instructive to note here that a warrant which is not executed until beyond the day specified **becomes invalid unless extended prior to the expiry period.** In terms of Rule 3 of the Court Brokers Rules, once a warrant of attachment or order for sale or other court process is issued by a court, the Registrar or magistrate may employ any person to exercise it.

Under rule 4 of the Court Brokers Rules, the executing officer, shall give the judgment-debtor at least a notice of 14 days either to settle the decretal amount or otherwise comply with the decree.

Section 48(1) of the C.P.C., subject to the proviso thereto, specifically provides that among the properties which are liable to attachment and sale are lands, houses, buildings etc. belonging to the judgment-debtor. All the same, it is categorically provided that "any residential house or building or part of a house or building occupied by the judgment-debtor, his wife and dependant children for residential purposes" shall not be liable to attachment or sale.

The law makes a clear distinction in the modes of attachments and subsequent sales of movable and immovable properties in execution of money decrees. Rule 42 of Order 21, deals with attachment of movable property other than agricultural produce in possession of the judgment-debtor. Attachment of such property is by actual seizure of the property and the attaching officer shall keep it in his own custody or that of his subordinates.

On the other hand, attachment of immovable properties, such as lands, buildings, etc. is governed by rule 53. The rule reads: -

*"53 (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.*

*(2) The order shall be proclaimed at some place on or adjacent to such property by such means as are used locally to make public pronouncements and a copy of the order shall be fixed on a conspicuous part of the property and then upon a conspicuous part of the court house."*

Such attachments come to an end before sale by removal after the satisfaction of the decree (rule 54) or by determination of the court under rule 56 when on account of the decree-holder's default the court is unable to proceed further with the application or by release upon successful objection proceedings under rules 57-59.

As already shown, the decree-holder had applied for the attachment and sale of the judgment-debtor's immovable property. The judgment-debtor is one M/s SAM CONSTRUCTION CO. LTD. Assuming without deciding here that the said landed property belonged to the judgment-debtor, we would have expected the executing court to issue an order and a warrant of attachment in terms of rule 53. Such warrant is usually known as a **prohibitory order**. This was not done. The High Court record does not contain a formal order issued by it under this rule. What is on record is that after it had on 6<sup>th</sup> October, 2009 admitted the application for execution, on 27<sup>th</sup> October, 2009, the Registrar issued a "*warrant of attachment of movable property.*" This was highly irregular. But that was not all.

While the decree sought to be executed was issued on 29<sup>th</sup> June, 2009, this warrant showed that the decree was given on 6<sup>th</sup> October, 2009, which again was wrong. Although this warrant was purportedly issued on 27<sup>th</sup> October, 2009 it never specified the day on or before which it had to be executed. This was in breach of rule 22 (3) which is mandatory. Curiously also, the executing officer was commanded to return the same to the court "on or before the 19<sup>th</sup> day of October, 2009 with an

endorsement certifying the day on which and manner in which it has been executed or why it has not been executed." The one million-dollar question which has evaded all rational answers, is: - How would the executing officer have returned the warrant even before it was issued to him? Worse still, the property commanded to be attached be it movable or immovable, was not shown at all on this so-called warrant of attachment. Yet acting on this document the Court Broker attached the house on Plot No. 137 Block D, Sinza area and eventually, after obtaining a court order on 14<sup>th</sup> June, 2010, sold it by public auction. In view of all these violations of the mandatory provisions of the law, we are of the settled view, that the execution processes leading to the selling of the said house were marred by material irregularities and illegalities. There was yet another serious irregularity and/or illegality.

As we have already shown, long before the High Court ordered the sale of the house, Mrs. Anna Mhina had instituted objection proceedings against the attachment. When this application was brought to the attention of the learned judge he had observed: -

*"The application by the objector which was brought before me on the 2<sup>nd</sup> day of March, 2010 after I had pronounced the ruling cannot be*

*entertained on the ground that it is overtaken by event (sic)."*

In our respectful opinion we think the learned judge had no legal justification for refusing to entertain the application of Mrs. Mhina. He had only made an order a day before that the "attached" house be sold by public auction. As he came to realise later, through a subsequent application by the decree-holder to amend the order of sale made on 2<sup>nd</sup> March, 2010, that order had not specified the date, time and place when and where the sale was to be conducted. This he rectified in his subsequent order of 14<sup>th</sup> June, 2010. But, in our considered opinion, even if the order of 2<sup>nd</sup> March, 2010, were free of any deficiencies, the learned Judge still had the power and jurisdiction to entertain the matter. This power he had under Order 21, rule 57 (2) of the Civil Procedure Code.

Rule 57(2) reads as follows: -

*"Where the property to which the claim or objection applies has been advertised for sale, the court ordering the sale may postpone it pending the investigation of the claim or objection."*

See also MULLA (op.cit) at page 1808-5A. He says: -



*"Whenever a claim is preferred under Order 21, rule 58 against the attachment of immovable properties, the fact that the properties are sold or the sale is confirmed, will not deprive the court of its jurisdiction to adjudicate on the claim. The inquiry into the claim can be proceeded with by the trial court... and in the event of the claim being allowed, the sale and confirmation of sale shall to that extent, be treated as a nullity and of no effect."*

In the light of these clear statutory provisions and the grounds upon which the objection to attachment were based, we are of the firm view that the learned judge had not only the power but also the duty to hear and determine Mrs. Anna Mhina's application. Having failed to do so, i.e. having declined to exercise his jurisdiction, regardless of the merits or otherwise of her claims, we have found ourselves lacking the temerity to hold that no gross injustice was occasioned to her. Her application had to be heard even if eventually it would have been found lacking in merit.

All said and done, we hold that the impugned execution proceedings were indeed conducted with material irregularities and illegalities, which led to an apparent failure of justice. The only remedy available is to nullify

them. In the exercise of the Court's revisional powers under section 4(3) of the Act, we nullify the proceedings in the High Court as from 7<sup>th</sup> October, 2009 onwards and all orders made therein, quash and set them aside. This will include the order for the sale of the house situate on Plot No. 137 Block D, Sinza area in Kinondoni District/Municipality which was sold without any process being issued for its attachment.

We make no order for costs.

It is so ordered.

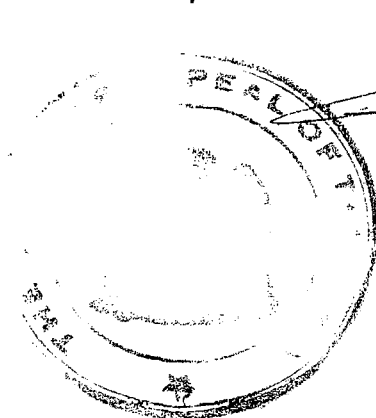
DATED at DAR ES SALAAM this 5<sup>th</sup> day of November, 2010.

E.M.K. RUTAKANGWA  
**JUSTICE OF APPEAL**

J.S. BWANA—  
**JUSTICE OF APPEAL**

S. MJASIRI  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



E.Y. Mkwizu  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**