

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: LUANDA, J.A., MUSSA J.A., And JUMA, J.A.)

CIVIL APPLICATION NO. 44 OF 2012

OTTU ON BEHALF OF P.L. ASENGA AND 109 OTHERS..... APPLICANTS

Versus

AMI (TANZANIA) LIMITEDRESPONDENT

**(Application for Review from the Decision of the
Court of Appeal of Tanzania at Dar es Salaam)**

(Munuo, Luanda, Massati, JJJ.A.)

dated the 16th day of February, 2012

in

In Civil Application No. 35 of 2011

.....

RULING OF THE COURT

6TH MAY & 10TH JULY 2013

LUANDA, J.A:

This is an application for review made under Rule 66 (1) (a) (b) & (c) and (2) of the Court of Appeal Rules, 2009 (the Rules). The applicants are inviting the Court to review its decision/Ruling dated 16/2/2012.

Briefly the historical background giving rise to this application is this:-
On 8th April, 2011 the applicants filed in this Court an application for Revision and Order of the High Court (Fauz, J) which set aside the sale on the ground of irregularity under O.XXI, Rule 88(1) of the Civil Procedure Code, Cap 33 RE 2002 (the CPC). The sale was conducted so as to realize the decretal sum of money amounting to Tsh. 5 Billion arising from the judgment of High Court (Katiti, J & Rugazia, J). The immovable properties of the respondents were sold by public auction where the 3rd and 4th applicants emerged successful bidders and bought the properties.

The decision of the High Court to set aside the sale prompted the applicants to come to this Court for revision. Their main complaint was that the High Court failed to consider the scope and application of the provisions of O.XXI, Rule 88 of CPC. It was their contention that sale can only be set aside under O.XXI, Rule 88 of the CPC if it is shown there are material irregularity or fraud in publishing or conducting of the sale and that the applicant must prove to the satisfaction of the Court that he has suffered substantial injury by reason of such irregularity or fraud. The respondent maintained that the sale (auction) was marred by material

irregularity in that it was conducted hurriedly before the expiry of the statutory period of thirty days and it was done on a public holiday.

This Court did not consider the grounds raised and the submissions of the parties. In its stead it revised the entire High Court proceedings *suo motu* and invoked its revisional powers under section 4(3) of the Appellate Jurisdiction Act, Cap. 141 RE. 2002 by nullifying all execution proceedings proclamation of sale and the Ruling and Order of the High Court (Twaib, J) and in terms of Rule 48 (3) of the Labour Rules and ordered transmission of the decree in appeal to the Labour Division of the High Court for execution as we put it;

"...we are satisfied that the Labour Court is responsible for executing the decree in appeal as stipulated under the provisions of Rule 48(3) of the Labour Court Rules, 2007. We are of the settled mind that cases originating from the then Industrial Court and now the Labour Court, should be executed by the Labour Division of the High Court of Tanzania as stipulated under Rule 48 of the Labours Court Rules. Under the circumstances, we

exercise our revisional powers under section 4(3) of the Appellate jurisdiction Act, Cap. 141 RE 2002 and nullify all the execution proceedings, proclamation of sale therein, and the Ruling and order of Twaib, J. We order that the decree in appeal be transmitted to the Labour Division of the High Court at Dar-es-Salaam where the applicants can initiate fresh execution proceedings. We make no order for costs."

It is this decision which is the subject matter of this application for review. The applicants have raised three grounds, namely:-

1. The Applicants were wrongly deprived of an opportunity to be heard when the Court *suo muto* (sic) considering and deciding on applicability and or interpretation of the provisions of Rule 48 of the Labour Court Rules, 2007 published in the Government Notice No. 106 of 18/5/2007 in as much as the execution of the decree of the High Court in

appeal from the decisions of the defunct Industrial Court of Tanzania is concerned.

2. The decision of this Court is based on manifest error on the face of the record resulting in miscarriage of justice.
3. That the Court's decision is a nullity in view of the fact that it, *inter alia*, violates the cardinal principles of natural justice and that it wrongly interpreted the provisions of Rule 48 of the Labour Court Rules, 2007.

However, before we proceed further, we wish to point out that paragraphs (a) to (e) of sub-rule 1 of Rule 66 of the Rules have no cumulative effect. This is because of the use of the word "or"; it is in the alternative. So, the Court can exercise its powers of review if it is satisfied that any one of the grounds enumerated therein has been violated.

The Rule reads:-

66(1) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds;-

- (a) The decision was based on manifest error on the face of the record resulting in the miscarriage of justice; **or**
- (b) a party was wrongly deprived of an opportunity to be hear; **or**
- (c) the court's decision is a nullity; or
- (d) the Court had no jurisdiction to entertain the case, **or**
- (e) the judgment was procured illegally **or** by fraud **or** perjury. [Emphasis supplied]

Be that as it may, the applicants are of the settled view that the decision of this Court, reproduced *supra* has been handed down in the violation of the aforestated grounds, hence the application for review.

In this application, Mr. Rosam Mbwambo advocated for the 1st applicants and also holding brief of Mr. Sylvester Shayo learned Counsel for

the 4th applicant; Mr. Martin Matunda learned Counsel appeared for the 2nd applicant, Mr. Erasmus Buberwa learned advocate represented the 3rd applicant; and Mr. Mpale Mpoki learned advocate assisted by Ms. Aneth Kirethi, Mr. Daimu Halfani and Mr. Protase Zaki learned Counsel appeared for the respondent.

Having read the grounds of review as contained in the notice of motion, and the submission both oral and written, we are of the settled view that the crux of the matter revolves around the applicability of Rule 48 (3) of the Labour Rules and the manner in which it was applied.

In a nutshell the applicants are contending, *inter alia*, that throughout the hearing of revisional proceedings, the only provision the parties and the Court discussed and addressed was the application of Section 33 of the Civil Procedure Code, Cap. 33 RE 2002 (the CPC). The Court did not give them opportunity to air their views as to the applicability of the said Rule before it handed down its decision. The Court raised it in the course of writing its Ruling and revised the proceedings *suo motu*. If the Court was of the firm view that Rule 48 of the Labour Rules is

applicable, then it should have given them opportunity to say something in connection with that Rule before it gave its decision as was done in **East African Development Bank V. Khalfan Transport Co. Ltd**, Civil Appeal No. 68 of 2003. Failure to give them opportunity amounts to condemning them unheard. So, the nullification of the execution proceedings and the Ruling thereof were not proper at all.

As regards the right to be heard, the respondent opposed the stance taken by the applicants. They said the course taken by the Court was correct because it was an obligation of the Court to examine the proceedings brought to it for corrections, legality or propriety. There was no need on the part of the Court to afford the parties opportunity to express their views.

The record shows that the Court applied Rule 48 (3) of the Labour Rules when composing the Ruling and made a decision without affording the parties opportunity to be heard whereby the parties' rights were effected. We think the course taken by the Court in raising and deciding a point of law when composing the Ruling which effects the rights of the

parties without affording them opportunity is a violation of one of the principle of natural justice namely the right to be heard *Audi Alterem Partem*. The principle of the right to be heard demands that before one's rights are being determined by any authority he should be afforded opportunity of hearing. Failure to accord such opportunity will of necessity lead to the nullification of the decision arrived at.

In Mbeya-Rukwa Auto parts Transport Ltd V Jestina George

Mwakyoma [2003] TLR 251 the Court said:-

" In this Country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6)(a) includes the right to be heard amongst the attributes of the equality before the law, and declares in part:-

(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au Chombo kinginecho kinachohusika, basi mtu huyo

*atakuwa na haki ya kupewa fursa ya kusikilizwa
kwa ukamilifu.”*

In yet another case in **Abbas Sherally and Another V Abdul S.H.M. Fazalboy**, Civil Application No. 33 of 2002 (unreported) the Court stated:-

“ The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.”

In our case, we have shown that the decision of the Court was arrived at in violation of the principle of natural Justice. In terms of Rule

66(1)(b) of the Rules, the Court is clothed with jurisdiction to review its decision. In exercising our powers we accordingly vacate our decision, quash and set aside the orders made thereof.

But the Court did not at all discuss and made decision in respect of the revisional proceedings filed by the applicants. We find proper and appropriate under the circumstances to discuss and make a decision otherwise the said application namely Civil Application No. 35 of 2011 will be hanging in the air. Fortunately the parties had already made their submissions.

As pointed out earlier on, the applicants had filed the application for revision on the ground that the decision of the High Court to set aside the sale was not proper as it failed to consider the scope and application of O.XXI Rule 88 (1) of the CPC. In brief, the applicants are saying that in order for the Court to set aside the sale under O.XXI Rule 88 (1) of the CPC, it must be shown that there is material irregularity or fraud in publishing or conducting of the sale and further the applicant must prove

to the satisfaction of the court that he has suffered not only an ordinary injury but a substantial one.

In our case that was not established, they submitted. They said the High Court took extraneous matters to set aside the sale.

The respondent on the other hand submitted that the High Court gave a reasoned decision. They also went further to say that the executing court had no jurisdiction to execute the decree.

In his affidavit in support of the Chamber Summons in the High Court, Mr. Grant Lendrum, Principal Officer of the respondent raised three grounds in the following paragraphs namely.

7. THAT the proclamation of sale has been executed hurriedly before expiry of statutory period of thirty days from affixing of the same on court notice board and the properties to be auctioned.

8. THAT, the proclamation of sale did not show the amount which the 1st respondent was claiming and to be satisfied as no money is awarded by the judgment and decree which is [in] the Court record.

9. THAT, the Counsel for the 1st respondent misled the Court in applying for the execution in the appellate Court instead of the applying in the Industrial Courts (Now Labour Court) which was the Court of first instance which could have verified information in implementing the procedures mentioned in paragraph 4.

In their counter affidavits Mr. P.L. Assenga and Mr. Mustapha Nyumbankali for the 1st and 2nd applicants respectively refuted what had been deponed by Mr. Lendrum.

Paragraphs 20, 24, 26, 27 and 28 of the Mr. Assenga read;

20. That as regards the contents of paragraph 7 of the Affidavit it is stated that the same is also not true. The sale was not conducted hurriedly. It was ordered, proclaimed and a copy of proclamation affixed on the Court house on 30/11/2010. The sale was set by the Court to be conducted on 20/12/2010 and 10.00. am.
24. That it is stated in further response to paragraph 7 that sale was carried out on 26/12/2010 in compliance with the Court order of sale issued by the this Honourable Court, Honourable Rugazia, J. on 30/11/2010 and the proclamation of sale signed by the same Honourable Judge on 30/11/2010 and affixed on the Court house on the same date. The sale was only 26 days after the affixing the notice of proclamation of sale. It was not hurriedly done as claimed.

26. That the 1st Respondent states that the thirty (30) days requirements provided for by law and stated in paragraph 7 of the Affidavit is not applicable where the date and time of sale was set by the Court itself like in the instant case. It only applies where the order of sale does not specify the date and time of sale.
27. That it is also stated on the thirty (30) days requirements that it is non compliance is a mere irregularity which per se does not make the sale void unless the Applicants had suffered substantial injury. The Applicants have not demonstrated in their affidavit that the said non compliance has exposed them into substantial injury. The Applicants have not demonstrated that there were fraud in the publication and sale of the properties either. The application does not meet the test prescribed by the law.

28. That in answer to the contents of paragraph 8 it is stated that the same is not true. This Honourable Court awarded money decree. The amount to be executed was stated in the application for execution and in the Prohibitory/Attachment order issued by this Court on 7/1/2009 and in the 14 days notice issued to the Applicants. Copies of the Notice and Order marked "K" are attached.

Mr. Mustapha Nyumbamkali on the other hand deponed as follows in response to para 7,8 and 9 of the Mr. Lendrum's affidavit:-

9. That I dispute the contents of paragraphs 7 and 8 of the affidavit. In further response thereto I state that the sale of the properties by public auction on the 26th December, 2010 was ordered by Hon. Rugazia. J on the 30th November, 2010 and that by reason thereof this Court cannot fault its own judicial orders. Further that the Applicant was not

thereby prejudiced as none is stated and substantiated in the supporting affidavit, hence no ground for setting aside the sale which has already been conducted and when the bona fide purchaser have already paid the full purchase prices. Further that the notice was sufficient in as much as it attracted so many bidders that some of the properties had to be left unsold because the monies stated in the prohibitory order were realized through the sale of only three of them, despite the Applicant's contemptuous acts to disrupt the Court ordered public auction. Further that as a Court broker I had to comply and sell the properties on the date proclaimed by the Court.

11. That in response to paragraph 9 I state that in as much the monetary rights were granted by this Court there is nothing wrong for the Court to execute what it has awarded.

In his replies to the 1st and 2nd respondents affidavits Mr. Lendrum deponed as hereunder.

17. THAT paragraphs 20, 21, 22, 23 and 24 of the Counter Affidavit are disputed and the 1st Respondent is put to strict proof thereof. The Applicant states that it was legally improper to conduct a sale before the statutory period provided for under the law and further proclamation for sale was never affixed on the Court house as provided in law.
19. THAT, in reply to paragraphs 26 and 27 of the counter Affidavit the Applicant repeats what has been stated in paragraph 7 of its main affidavit.
20. THAT in reply to paragraph 28 of the Counter Affidavit the Applicant repeats what has been

stated in paragraph 8 of the main affidavit and add that the amount to be executed must be stated in the judgment and not otherwise.

As to Mr. Mustapha is counter affidavit, Mr. Lendrum deponed:

7. THAT, in reply to paragraph 9 of the counter affidavit the applicants repeats what has been stated in paragraphs 7 and 8 of its main affidavit
8. THAT, paragraph 10 and 11 of the counter affidavit are vehemently disputed and the 2nd respondent is put to strict proof thereof.

In his lengthy Ruling, the learned High Court Judge properly framed the first two issues for determination by the High Court, namely;

- (1) Was there any material irregularity or fraud in the manner in which the sale was published or conducted.
- (2) If the answer is yes are the facts proved before me sufficient to show that the applicant has sustained substantial injury by reason of the said irregularity or fraud?

But the learned judge did not end there, he added one more issue, he said:-

" However given the submission made by counsel before me and the law as I understand it a third issue would arise relating to:

- (3) Whether it is necessary to prove substantial injury if it is found that the irregularity amounted to an illegality."*

The learned judge first was satisfied that the notice of proclamation of sale was published in the local newspaper of 15/12/2010. But because it was not affixed at the court premises and as the auction was conducted at the court's precincts without leave of the court, the omission were fatal, he concluded. Since those irregularities could not be determined to be substantial injury or not but as they violated the law they were substantial. He was satisfied that the injury were substantial, he accordingly set aside the sale.

Order XXI, Rule 88(1) of the CPC of which the applicant relied upon to move the court to set aside the sale is clear. The Rule reads:

88(1) Where any immovable property has been sold in execution of a decree, the decree holder, or any person entitled to share in rateable distribution of assets or whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it.

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

The meaning of the provisions cited above as correctly submitted by Mr. Mbwambo is that the grounds for setting aside the sale under Rule 88 (1) of O.XXI, is limited only to where it can be proved that there were irregularity or fraud in publishing or conducting the sale and further that the applicant must also prove to the satisfaction of the court that he has suffered substantial injury. We do not read the Rule to impose any other restriction as suggested by the judge.

So, a sale held in execution of a decree can be set aside under this rule only if the following conditions are fulfilled:-

- (a) There must be as material irregularity or fraud.

- (b) The material irregularity or fraud must be in publishing or conducting the sale.
- (c) The applicant must have sustained substantial injury.
- (d) Such injury must have been caused by reason of the material irregularity or fraud.

In our case, the first hurdle which the applicant had to jump is whether there were any evidence on the record to substantiate the application. We have deliberately quoted the relevant paragraphs of the affidavits in extenso in order to show the evidence which the applicant relied upon to support their application.

First, Paragraph 7 in their affidavit in support of their application does not state or elaborate how the proclamations of sale were hurriedly executed. However, the 1st and 2nd applicants conceded that the proclamation of sale was issued four (4) days short of the 30 days. They however said they were complying with the Court order (Rugazia, J). So there is no doubt at all that a proclamation of sale was issued. And the proclamation of sale is a notice whose purpose is to notify the public at

large, inter alia, the judgment debtor that the property mentioned therein would be sold. Despite shortage of four days the respondents, were aware of the sale. They even deployed bouncers to block the process. This unfortunate state of affairs forced the 2nd applicant to resort to the court building where the bidding took place and properties were bought. It is the evidence of the 2nd applicant that many people attended the auction and the day of the auction, a public holiday was ideal, which evidence was not challenged by the respondent. We do not think under the foregoing circumstances the irregularity mentioned supra amounted to an illegality as found out by the High Court. Indeed it could probably hold if the respondents were not aware at all of the execution process. Second, the respondent were also aware of the decretal amount involved. This is contained in the affidavits of the 1st and 2nd applicants which was not challenged at all in their reply. The respondents were aware not only the proclamation of sale but also the decretal amount. There is no evidence on record to show that the proclamation of sale was hurriedly carried out. Unlike the finding of the High Court, we find the evidence on record to substantiate their application wanting.

Finally is the question of lack of jurisdiction of the appellate High Court to execute the decree. This should not detain us for the following reason. The High Court was moved under O.XXI, Rule 88(1) of the CPC to consider the setting aside the sale on ground of irregularity or fraud. The High Court was moved to consider that ground only. There is no application on the record to consider the question of jurisdiction of the executing court. It was no wonder, the issue was not canvassed in the High Court and a decision made. So we find it is not proper to venture into a matter which was not properly raised.

In the exercise of our revisional powers as provided under S. 4(3) of the Appellate Jurisdiction Act, Cap; 141 RE. 2002 we quash the proceedings of the High Court, set aside the order made thereof and declare the auction was properly carried out and buyers are bona fide purchasers for value. We direct the High Court to finalize the process as per the dictate of Rules 90(1) 92 and 93 of Order XXI of the CPC.

The application is allowed with costs.

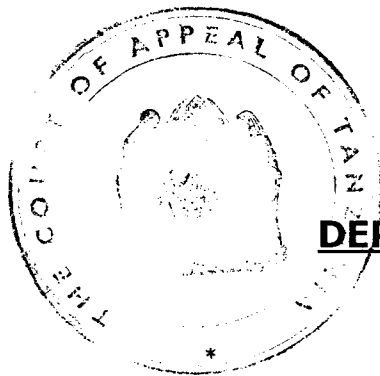
DATED at **DAR ES SALAAM** this 8th day of JULY 2013.

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original



A handwritten signature in black ink, appearing to be "Z.A. Maruma".

Z.A Maruma
DEPUTY REGISTRAR