IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MJASIRI, J.A. And MUSSA, J.A.)

CIVIL REVISION NO. 3 OF 2013

SHINYANGA REGION CO-OPERATIVE UNION (SHIRECU) LIMITED.....APPLICANT

VERSUS

1. **POLIYCARP KIMARO t/a SHINYANGA MWANANCHI GARAGE**
2. **MAMBA AUCTION MART & COURT BROKER**
3. **AHMED ALLY AMEIR**
4. **TINDE INVESTMENT**

.....RESPONDENTS

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

(Makaramba, J.)

Dated the 4th day of June, 2010
in
Commercial Case Appeal No. 17 of 2008

RULING OF THE COURT

18th September, & 25th October, 2013

LUANDA, J.A.:

These revisional proceedings were opened *suo motu* following a letter of complaint written by the General Manager of the above named applicant one Mr. J.M. Mihangwa to the Hon. The Chief Justice. The applicant's complaint is that after they had paid the decretal sum as agreed

and ordered by the High Court (Commercial Division) their landed properties standing on Plot No. 76 Block "S" Swynerton Road (Uzunguni) Shinyanga Township were sold by the order of the High Court by way of public auction in order to realize the decretal sum amounting to Tshs 178,098,215.85 and Court commission of Tshs 5,000/=.The applicant found out that the selling of their properties when they had already paid was not proper. In terms of section 4(3) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 revisional proceedings therefore were opened by the Court for the purpose of satisfying itself as to the correctness, legality or propriety of the decision complained of.

In these revisional proceedings, Mr. Gregory Lugaila learned advocate appeared for the applicant (Shinyanga Region Cooperative Union); Mr. Cyril Pesha and Mr. Mutabazi Lugaziya learned advocates represented the 1st respondent (Polycarp Kimaro t/a Shinyanga Mwananchi Garage); the 2nd respondent was represented by its director one Mr. Adamu Kassim Mamba; whereas the 3rd and 4th respondent Ahmed Ally Ameir and Tinde Investment respectively were advocated for by Mr. Medard Mutongore.

A brief account of the matter as per the record and which is not disputed by the parties is to this effect. On 17/3/2008 the 1st respondent filed a suit in the High Court (Commercial Division) against the applicant for recovery of a sum of money totalling Tshs 169,892, 409.00 being the costs of repairs done to the applicant's vehicles, loss of business and interests arising from a 2000/2001 crop season.

On 26/6/2008 the parties to the suit through their counsel informed the trial High Court (Werema, J) that they had reached an amicable settlement out of court and wish to record the settlement which settlement was duly recorded in court as a decree. The decree not only contains the decretal sum of money Tsh. 49,750,000/= payable to the 1st respondent but it also includes the schedule of payments and a default clause. All in all, however, by 31st October, 2010 the applicant ought to have settled the debt.

The applicant, however, did not pay as agreed due to one reason or another. This prompted the 1st respondent on several occasions to resort to applying for arrest of the Principal Officer of the applicant and sent to

prison as civil prisoner which applications did not materialize because the applicant was paying though not according to the schedule and yet the 1st respondent was accepting. In view of this development, the High Court declined to commit the Principal Officer of the applicant to prison.

On 4/6/2010 yet again the 1st respondent applied for committing the Principal Officer to prison as civil prisoner. It was on that day when it was discovered that the applicant had paid a substantial amount leaving a balance of Tshs 5,000,000/= only. The High Court (Makaramba, J.) did not find justifiable under the circumstances to convict the Principal Officer to prison. In its stead it gave the applicant one month from that day (4/6/2010) to settle the balance Tshs 5,000,000/=. Indeed the applicant through their cheque No. 128829 paid the amount and the 1st respondent acknowledged receipt by a tax receipt of 3/7/2010 within the time ordered by the Court. That would have put the case to rest; it was not.

On 28/11/2012 after a period of 2 years and 4 months when the debt had already been settled, Mr. Pesha on behalf of the 1st respondent applied for execution of a decree (Tshs 178,098,213.85) for attachment and sale of

the houses of the applicant. The High Court granted the application despite protests. So, the two houses were sold to the 3rd and 4th respondent respectively. According to Mr. Mamba, the Court Broker, the houses fetched Tshs 55,000.000/= and Tshs 65,000,000/= respectively and the money is in the account of the Judiciary.

As to why they had attached and sold the houses while the applicant had already paid, Mr. Pesha said they were enforcing the Court decree dated 26/6/2008 and in particular paragraph 5- default clause.

We have shown that according to the deed of settlement which later on was registered as a decree, the parties to the dispute (the applicant and the 1st respondent)had agreed that the applicant shall pay a total sum of Tsh 49,750,000/=. Not only that they also put in place the schedule of payment showing the amount to be paid and the time frame. According to the schedule, the applicant ought to have settled the entire debt by 31/10/2008.

It is on record that the applicant did not stick to the schedule of payment but yet the 1st respondent accepted payments when made. The applicant cleared the debt on 3/7/2010 when the last payment was paid with the assistance of the High Court order and the 1st respondent accepted it without any objection.

Given the above sequence of events, it is clear that the conduct of the 1st respondent in accepting payment in violation of the schedule of payment till the debt was settled is deemed to have agreed to vary the agreement of payment. The 1st respondent cannot at a later stage deny and contradict what he had agreed and accepted which changes made the applicant to believe in and acted upon. Indeed the variation stated above in our view falls within the ambit of Article 5 of the agreement which is embodied in the decree which reads:-

> 5. That any default in payment of the installments shall render the settlement in operative and the plaintiff shall be at liberty to enforce the entire claim in the plaint as if this decree has never existed. ***PROVIDED that for any reason***

agreeable to the plaintiff, the defendant is inebriated from paying, the parties shall agree on an adjusted Schedule. [Emphasis supplied]

In terms of section 123 of the Evidence Act, Cap 6.RE. 2002 the 1st respondent is estopped from denying to have not agreed to the changes of schedule of payments as shown above. The section provides:-

123. When one person has, by his declaration, act or emission, intentionally caused or permitted another person to believe a thing to be true and act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

It is clear therefore that the applicant, at the time the houses were sold, had already settled the debt. We were very much disturbed and astonished by Mr. Pesha's insistence that he was enforcing the Court

decree which had already been settled. Equally disturbed is the manner in which the High Court (Makaramba, J.) had handled the matter. Had the High Court read and checked the record properly as we have shown above it would have not ordered the sale of the houses because the debt was settled more than 2 years ago. The complaint has merits.

In the exercise of our revisional powers as provided under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141, RE. 2002 we declare the sale of the houses were illegal. The same is quashed and set aside.

Mr. Medard Mutongore learned counsel for the 3rd and 4th respondents respectively submitted that his clients were *bona fide* purchasers for value without notice and so they should continue to own the same and the applicant should be given the proceeds of sale. To order that they should be given their money would deter the public from buying through auction ordered by the Court. He went on to say, in case the Court ordered the latter, then they should be awarded with interests.

Mr. Mamba has informed the Court the he has yet to handle the houses to the 3rd and 4th respondents and that no certificates have been

issued. So, the sale is yet to be confirmed. The question for decision and consideration is whether the title has passed to the 3rd and 4th respondents. To put it differently at what point in time a title passes to a buyer to a property sold by auction by an order of the Court?

In ***Peter Adam Mboweto*** V. ***Abdallah Kulala & Mohamed Mweke*** [1981] TLR 335 this Court held, *inter alia,* that a person who bought a property by public auction by an order of the Court acquired a good title after it is shown a certificate of sale was duly issued and confirmed.

Briefly the facts of the case was that in the Primary court of Lindi District the 2nd respondent (Mohamed Mweke) successfully sued the 1st respondent (Abdallah Kulala) for recovery of a loan. A coconut shamba of the 1st respondent was sold by public auction which shamba was bought by the appellant. A certificate was issued and the sale was confirmed. On appeal, the District Court set aside the judgment of the Primary Court but did not set aside the sale. The High Court set aside the sale. The appellant appealed to this Court. The Court said.

" The appellant had already acquired a good title to the shamba, and no good reason exists for disturbing his title in order to assuage the distress to Abdallah Kulala. As has been said in the authorities quoted, if a reversal of decree would invalidate a sale, there would be less inducement to any intending purchaser to buy at an auction sale thus depreciating sale prices and there will also be no degree of certainly as a purchaser cannot be expected to go behind a judgment to inquiry into irregularities in the suit. These propositions appear to be both good sense and good law."

So a person acquires a good title to a landed property upon the sale been declared absolute and a certificate issued. Short of that the property still remains under the ownership of the one to whom it was taken.

In our case, since the sale is yet to be declared absolute and certificate issued, the title has not passed to the 3rd and 4th respondents. The property remains under the title of the applicant. In view of the

foregoing therefore the 3rd and 4th respondents are entitled for payment of their purchase – money and in this case we order with interests at the Bank rate from the date of sale till payment. It is also on record that Mr. Mamba has not been paid his costs. He is entitled to those costs. The said interests and costs should be borne by the 1st respondent.

Order accordingly.

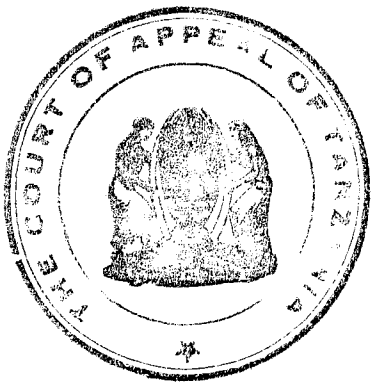
DATED at DAR ES SALAAM this 22nd day of October, 2013.

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL