IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: RUTAKANGWA, J.A,. MBAROUK, J.A., AND LUANDA, J.A.

CIVIL APPLICATION NO.8 OF 2016

1. JEHANGIR AZIZI ABDULRASUL.....1ST APPLICANT
2. RHINO AUCTION MART AND COURT BROKER .....2ND APPLICANT
3. M/S BENANDAY COMPANY LIMITED.....3RD APPLICANT

VERSUS

1. BALOZI IBRAHIM ABUBAKARI.....1ST RESPONDENT
2. BIBI SOPHIA IBRAHIM.....2ND RESPONDENT

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

(Rutakangwa, Mbarouk, Luanda, JJJ.,A.)

dated the 18th day of November, 2015

in

Civil Revison No. 6 of 2015

RULING OF THE COURT

28th June & 22nd July, 2016

RUTAKANGWA, J.A.:

In this application, the three applicants are seeking a review of this Court's ruling dated 18th November, 2015 in Civil Revision No. 6 of 2015. The review is sought on the basis of one ground. The complaint is that:

> *"In determining Civil Revision No. 6/2015 the parties were not heard by the Court on the sale of the Respondents (sic) property on plot 62 Msasani area Dar es Salaam."*

The application is by Notice of Motion brought under Rule 66 (1) (b) and (c) of the Court of Appeal Rules, 2009 (the Rules). Rule 66 (1) provides as follows:-

"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 a 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 heard;

(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".

For the purpose of this ruling we have found the most pertinent background to the application to be as follows: The 1st and 2nd respondents are husband and wife owning landed properties in Dar es Salaam. Such properties included a house situate on Plot No.62 at Msasani area. Further, the two were co-defendants in Moshi High Court Civil Case No. 4 of 2010, in which the 3rd respondent herein was the plaintiff.

On 1st July, 2011, the High Court delivered its judgment which was in favour of the plaintiff/3rd applicant. The defendants, now respondents, were aggrieved by the decree against them. They preferred an appeal to this Court by lodging a notice of appeal and then proceeded to apply for leave to appeal. Further to that, they lodged an application for stay of execution of the decree against them, which was struck out by this Court on 27th November, 2013. The notice of appeal was also subsequently struck out.

On the other hand, the 3rd applicant, as decree holder, desirous of enjoying the fruits of the decree, lodged an application for its execution on 11th September, 2014 at Moshi. It sought the attachment of the respondents' landed properties in Dar es Salaam, including the house on Plot No. 62 Msasani area.

On 16th February, 2015 the Deputy Registrar, High Court Moshi, sent the decree to the High Court (Land Division) at Dar es Salaam for execution, under section 34(1) and Order XX1, Rule 8 of the Civil Procedure Code, Cap. 33 R.E.2002 ("the CPC").

The parties in the execution proceedings appeared before the Deputy Registrar on 8th May,2015. Mr. Francis Stolla, learned advocate for the judgment debtors, unsuccessfully applied to have the execution proceedings

stayed for reasons we stated in our impugned ruling. The learned Deputy Registrar ordered execution to proceed. Mr. Joshua E. Mwaituka t/a Rhino Auction Mart ("the 2nd applicant") was appointed to carry out the execution process. With unparalled dispatch, a warrant of attachment of the respondents' targeted landed properties was issued. Eventually the house on Plot 62, Msasani, was auctioned by 2nd applicant. The purchaser was none other than one Jehangir Azizi Abdulrasul (the 1st applicant).

It is important, however, to point out that following the issuing of the attachment warrant in respect of the three landed properties and before the sale took place, the respondents believing that the executing Court had conducted the execution proceedings with material irregularities, sent a complaint letter to the Chief Justice, seeking his intervention to ensure that justice was done to them, hence the ***suo motu*** Civil Revision No. 6 of 2015.

Although under Rule 65 of the Rules, the Court has full discretion to determine ***suo motu*** revision proceedings without hearing the parties, all interested parties (that is, the three applicants) were summoned and heard fully. May be, it will highly refreshing to return to what we said in our now impugned ruling. We said thus:-

"We did exercise this discretion in the favour of the parties and they addressed us at length by way of written and oral submissions. We genuinely appreciate their efforts as they gave the case a great deal of thought and attention. However, we cannot hope to do full justice to them by taking on board all that they submitted on. This is simply because not everything they said is immediately relevant in these proceedings."

Indeed, many issues of fact and law were involved in those revison proceedings, but not all deserved serious consideration by the Court. However, one of the germane issues concerned the legality or otherwise of the attachment and ultimate sale of the house on Plot No. 62, Msasani area .Counsel for both sides, addressed us to the best of their abilities on this issue in both their written and oral submissions.

Our decision on this crucial issue in those proceedings was not peremptory. After a thorough perusal of all the material before us and research on the law governing execution proceedings, we arrived at considered decision that the execution proceedings leading to the attachment and sale of the sold property was riddled with firstly, material irregularities, and secondly and most important, patent illegalities which

rendered the purported sale illegal and ***void ab initio.*** We might have been wrong in so holding, although we firmly believe that we were not. All the same, that cannot be a ground for review and in all fairness to the applicants, the review in these proceedings, according to the Notice of Motion, is not sought under that head or ground.

Having held that the court sanctioned auction of the respondents' house was void, we proceeded to set aside the sale and ordered the purchaser, now 1st applicant, to *"be refunded his purchase price by whosoever is holding it."*

As shown at the outset, the applicants believe that we committed a fundamental error in our reasoning process leading to the nullification of the sale. Through Ms. Crescensia Rwechungura and Mr. Jamhuri Johnson, learned advocates, we are being pressed to hold that we arrived at our decision on that issue without giving them a hearing.

To substantiate this grievance, in their joint written submissions, by way of introduction, they correctly directed themselves thus:-

> *Your Lordships, in this application the applicants are seeking for Review of the decision of Civil Revision No. 6/2015 because the applicants discovered some important*

facts which were not raised and argued during the hearing of the Application for Revision. On the basis of that the applicants shall only submit on the findings of this Court on the 4th irregularity which relied (sic) by this court to nullify the sale of the respondent's (sic) property on plot no.62 (sic) Msasani area purchased by the 1st applicant."

After this seemingly attractive introduction, the learned advocates, with respect, digressed. They concentrated their attack on the finding of the Court to the effect that the sale was a nullity on account of failure by the executing court to comply with the mandatory provisions of Order XX1, Rules 53 (2) and 66 of the C.P.C. They are claiming we were wrong. They thus contended:-

"Your Lordships, the spirit behind order XX1 rule 66 (1) and 53 (2) of the civil procedure code (sic) is to make sure adequate publicity is done before the sale of the judgment debtor's property".

They went on to argue that there was sufficient evidence on record which shows that the requirement of publicity of the sale was met by the executing court. In support of this assertion, they referred us to the affidavit

of Ms. Rwechungura and Mr. Joshua Mwaituka and a cutting from the "Nipashe" newspaper of 26th May, 2015.

It was also their strong contention that as the case is *"based on the value of the respondent property which exceeds the sum of Tshs. 100,000,000/= based on rule 88 (1) of order XX1...the respondents were required to apply to the High Court to set aside the sale on grounds of irregularities..."* As this was not done, they stressed that this Court irregularly *"assumed the jurisdiction of the High Court"* in proceeding *"to nullify the sale on the grounds that the requirement of rules 66(1) and 53 (2) of the civil procedure code (sic) had not been met by the executing Court".*

In winding up their written submissions, the learned advocates, citing the case of **Peter Adam Mboweto v. Abdala Kwala nad Another** [1981] TLR 335, submitted *that "since the 1st applicant was not aware of the irregularities noted by this Court in the record of proceedings of Misc. Land Application No.9/2015 at the time of purchasing the property,"* he is **deemed** to be a **bona fide** purchaser for value and the sale should not be set aside. They concluded as follows:-

> *"...on the basis of that we pray that the applicant application (sic) for Review before this honourable court be allowed. Based (sic)*

on the reason which have been advanced by the applicants."

At the hearing of this application Ms. Rwechungura adopted their written submissions. However, she at first had the temerity of claiming that the issue of the illegality or otherwise of the execution proceedings generally and the sale of the house on plot 62 Msasani area was raised by the Court "while composing the ruling." Forgetting that they had pressed us not to nullify the sale on the basis of identified irregularities. Not taken aback by this bold assertion, we took her through the respondents' written submissions in the revision proceedings, especially on page 6 and page 18 of their joint written submissions.

On the said page 18 of applicants' written submissions, we find the 6th issue as framed by them to be:

"Whether it was proper and lawful for the applicant's (supra) property on plot no 62 Msasani areas (sic) to be sold to satsfy the decree."

We also referred her to the oral submission of Mr. Beatus Malima, learned advocate, who had teamed up with Mr. Francis Stola, to the effect that there was non-compliance with the provisions of Order XX1, rules 4, 53,

66,67,ect. which rendered the entire execution proceedings a nullity. We also referred to her response thereto urging us not to nullity the sale. On full reflection and in response to the Court's question, she was forthright of settled for this admission:-

> *"The issue of legality of or otherwise of the sale of the house on Plot No.62 was addressed by us in our submissions."*

To us, this tells it all.

Mr. Francis Stolla, who appeared before us together with Mr. Joseph Nuwamanya, learned advocates, opted to adopt their joint written submissions lodged in Court on 12th May 2015. In this reply submission, counsel for the respondents strongly denied the applicants' claim that they were not heard on the issue of the sale of the house on Plot No. 62, Msasani area. To drive their point home, they tellingly stressed that the Court had to adjourn the hearing and determination of the ***suo motu*** revision proceedings in order to bring on board the 1st and 2nd applicants and hear them to avoid the possibility of being adversely affected without being heard.

They strongly contended that to *"allege that the applicant's (sic) were denied an opportunity to be heard is a mischaracterization of what transpired before the Court."*

To cement the above argument, the learned advocates thus reasoned:

> *"The only involvement of these two parties was for the auction and purchase of the property comprised on plot No. 62.The question then is why the Court would invite them to the proceedings if it was not to hear them on the actual purported sale process. The rhetoric question is why else would the Court invite them to be in Court and for what other purpose?"*

We are also equally surprised. If they were not heard on this issue why did they urge us not to avoid the sale as the identified irregularities and/or illegalities were curable under rule 88 of Order XX1?

In disposing of this application, which in our considered view has all the hallmarks of abuse of the court process, we hold without any fear of being contradicted that the issue of the legality or otherwise of the entire execution proceedings leading to the sale of the house situated on Plot No. 62 Msasani area was one of the crucial issues in the revision proceedings. The parties themselves raised it as an issue in the written submissions. They addressed us on this issue. If they failed to advance convincing arguments to resolve it they have themselves to blame. The Court did put specific

questions to Mr. Malima on whether or not the mandatory provisions of Order XX1, rules 53, 66,67 of C.P.C were complied with and he provided negative answers. In their response both Ms. Rwechungura for the 1st respondent and Mr. Mohamed Mkali, learned advocate for the auctioneer and purchaser turned a blind eye on this issue. The pith of their argument was that as the sale had been confirmed, it could not be set aside. They cannot now be heard to complain that they were not heard by the Court a claim they have failed to substantiate in these proceedings. Instead they directed their attack on what they conceived to be the demerits of the decision, which factor has never been a ground for review.

We wish the two learned advocates to appreciate the universal truth that it is the duty of a judge to give a reasoned decision. Failure to do so would have amounted to a dereliction of duty. Furthermore, inability of counsel to address the court comprehensively and adequately on any agreed issue cannot be equated with failure by the court to afford an aggrieved party a hearing. Counsel for the applicants, in our respectful opinion, appear to have confused the scope of review jurisdiction with that of appellate jurisdiction. It is trite law that a review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected, but lies only on

the grounds clearly stated in Rule 66 (1) of the Rules: See for example, **Chandrakant J. Patel v.R**.(2004) T.L.R, 218. D**r. Amani W. Kabourou v. The A.G. & Another**, CAT Civil Application No. 70 of 1999 (unreported), etc.

All said and done, we hold that the applicants were, as admitted, afforded opportunity to be heard on the legality or otherwise of the execution processes leading to the sale of the respondents house in satisfaction of the decree in favour of the 31st applicant. We accordingly find this application totally wanting in merit and we dismiss it with costs.

DATED at **DAR ES SALAAM** this 1st day of July, 2016.

E.M.K RUTAKANGWA

JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

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

T.K. SIMBA
DEPUTY REGISTRAR
COURT OF APPEAL