IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., GALEBA, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 391 OF 2022

MOHAMED KANJI ..... APPELLANT

VERSUS

MAC CROUP LTD .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania , Land Division at Dar ss salaam)

(Opiyo, J.)

dated 15th day of May, 2020
in
Land Case No. 197 of 2006
.....

JUDGMENT OF THE COURT

5th & 22nd May, 2023

MAIGE, J.A.:

This appeal arises from the decision of the High Court of Tanzania, Land Division (the trial court) which declared the respondent herein the lawful owner of the go-downs Nos. 35A and B on plot 21 and part of plot 22 at Nyerere Road in Dar Es Salaam ("the suit property") and restrained the appellant perpetually from interfering with the respondent's peaceful enjoyment of the same. In the memorandum of appeal, the said decision is challenged on three grounds. **First,** for apportioning the suit property and

separating therefrom a portion and allocating it to the respondent. **Second**, for the determination of an issue which had already been finally and conclusively determined by the same court and which involves the same subject matter. **Three**, for declaring the respondent a lawful owner of the suit property basing on mere inference from correspondences.

From the pleadings and evidence, it would seem, the three plots around which the dispute revolves, namely plots numbers 21, 22 and 23 Block D, Pugu Road, Dar Es Salaam (now Nyerere Road), henceforth "the three plots", were until 1994, the property of the defunct Tanzania Hides and Skins Limited under receivership of the Tanzania Investment Bank ("the TIB"). The respondent claimed to have purchased the suit property in 1994 from TIB but in the sale agreement (exhibit P7) and the certificate of title (exhibit P5), the three plots were mistakenly included as part of the suit property. He claimed further that, on realization of the error, and upon direction from the Ministry of Land, exhibit P5 was surrendered to the said Ministry for sub-division to exclude from the suit property the office building on plot 23 and part of plot 22 which was purchased by Data Machines Limited from the same vendor.

Conversely, the appellant claimed to have purchased the three plots through a public auction in execution of a decree of the Court of the Resident Magistrate of Dar Es Salaam at Kisutu arising from Civil Case No. 230 of 2001 between Ahmed Rajabu and Data Machines Limited as per the certificate of sale in exhibit D1. It was further the appellant's case that, after the said purchase, Data Machines Ltd commenced an application to have the sale set aside which was disallowed by the executing court and the sale confirmed as per exhibit D2 and D3. It was the appellant's case that; as she was an auction purchaser in execution of a decree and the sale having been confirmed after the dismissal of the application to set it aside, it became absolute such that it could not be a subject of a fresh suit.

In determination of the dispute, the trial court was guided by two issues namely; who is the lawful owner of the suit property and which reliefs are the parties entitled to.

At the trial court, the respondent paraded three witnesses to advance his claim including her principal officer one Neema Victor Ndone (PW1). She testified that; the respondent purchased the **suit property** in 1994 from TIB through bidding process having come out as the successful bidder as per exhibit P1. She testified further that, although it was not in dispute that Data Machines Limited purchased an office building on plot

number 23 and part of plot 22, in the certificate of title which was issued to the respondent, the said interest was mistakenly included. She said, there was eventually a process to resurvey the plots so as to reflect the two contending interests. To substantiate her claim, she produced, which were admitted collectively as exhibit P3, the relevant correspondences between the Ministry of Land and the two companies and their predecessor in title. In the process, the respondent surrendered the original certificate of title and the sale agreement to the Ministry of Land for the necessary action.

Next was Hellen Philip (PW2), a land officer from the Ministry of Land. She confirmed of there being a sale agreement in exhibit P4 in the register indicating that the respondent purchased the suit property from TIB as a receiver of the Tanzania Hides and Skins Ltd in 1994. She confirmed further that; on application, the respondent was issued with the certificate of title in exhibit P5. Subsequently, she added, her offices received a letter from Data Machines Limited (exhibit P6) complaining that the property constituting the head office building at plot 23 and part of plot 22 that she purchased from TIB as per the sale agreement in exhibit P7, had been mistakenly included in exhibit P5. As a result, her offices issued a notice of cancellation of exhibit P5 so as to exclude the said interest from it. Afterwards, she further narrated, the Ministry received a letter from the

appellant to the effect that, he had purchased, through public auction, all the three plots (exhibit P9) and he would wish to be registered as the owner of the property. On verification, she added, it was established and the appellant was notified as per exhibit P10 that, what was purchased by the appellant was an office building at plot 23 and part of plot 22. In her evidence, therefore, the suit property belonged to the respondent.

Menson Ngahatirwa (PW3), a director of legal service at the TIB, confirmed the testimony of PW1 and PW2 to be true as per the record in their office. He testified that; while the respondent purchased the suit property, Data Machines Limited purchased the head office building at plot 23 and part of plot 22. He admitted further of there being errors in exhibit P5 in so far as it gave total ownership of the three plots to the respondent. Further to that, he confirmed of there being a process at the land registry to have the three plots partitioned to reflect the interests of the two entities.

The appellant, Mohamed Hassanal Kanji (DW1) testified that, he purchased the three plots in 2003 through an auction pursuant to a court order in execution. He produced, which were admitted as exhibit D1 collectively, the relevant proclamation for sale and certificate of sale. He said, he became aware of the auction through a publication on newspapers on 2nd day of June, 2003. He testified further that after the sale, Data

Machines Limited, which was the judgment debtor and the owner of the sold property, applied to the court to have the sale set aside, the application which was dismissed (exhibit D2). There was an appeal to the High Court which was also dismissed and the appellant declared the lawful purchaser of the said plots (exhibit D3). The executing court then wrote to the Commissioner for Lands for change of ownership of the property (exhibits D4). He testified further that, at one time, the Presidential Sector Reform Commission instituted a suit to challenge the sale in question which was struck out for want of jurisdiction (exhibit D5). In his conclusion, therefore, the three plots belong to him.

In her well-reasoned decision, the trial Judge having appraised the evidence, she was of the view that; since the appellant purchased the property in execution of a decree against Data Machines Limited whose ownership interest was only to the extent of the office building at plot 23 and part of plot 22, and, there being concrete evidence of the respondent's prior ownership interest on the go-downs at plot 21 and part of plot 22, the appellant could not be said to have purchased more than what the judgment debtor owned. She, therefore, declared the respondent the lawful owner of the suit property and henceforth the instant appeal.

At the hearing of the appeal, Mr. Samson Mbamba, learned advocate represented the appellant whereas his learned friend advocate Senen Mponda represented the respondent.

Mr. Mbamba's submissions on the first ground was that, as the appellant bought the three plots in question through a public auction pursuant to the court order, and the certificate of sale in exhibit D1 having been confirmed by both the executing court and the High Court as per exhibit D2 and D3, the same became absolute and the appellant acquired good title on the respective plots. He submitted, therefore, that in separating the two go-downs at plots 21 and part 22 from the three plots purchased by the appellant, the trial court acted against the well-known principle of law that; what is fixed on the land is part of the land (*quicquid plantatur solo, solo cedit*). Reference was made to the decisions in **Peter Adam Mboweto v. Abdallah Kulala and Mohamed Mweke** [1981] T.L.R. 335 and **Shinyanga Region Co-operative Union (Shirecu) Limited v. Poliycarp Kimaro t/a Sinyanga Mwananchi Garage and 3 Others**, Civil Revision No. 3 of 2013 (unreported) in support of the proposition that, a person who bought a property pursuant to execution order by the court, acquires a good title after issuance of a certificate of sale and confirmation thereof.

He submitted further or in the alternative, in line with the principle in **Peter Adam Mboweto** *(supra)* which was referred in **Ahmed Ally Salum v. Ritha Baswali and Kitenge Furahisha,** Civil Application No. 21 of 1999 (unreported) that; the appellant having purchased the three plots from a public auction, he became a *bonafide purchaser* for value duly protected by law and the courts.

Mr. Mbamba's submissions on the second ground was based on two propositions. **First,** the appellant's purchase of the three plots through an auction by court order having become absolute by virtue of the confirmation in exhibit D2 and D3, it was, as decided by the High Court in exhibit D5, conclusive subject only to a suit under O. XX1 r. 62 of the Civil Procedure Code [Cap.33 R.E. 2019] henceforth "the CPC". **Two,** as the issue of sale of the three plots was earlier on determined by the trial court in exhibit D3, the decision in dispute was bad in law for constructively overruling the said decision. Reference was made to the case of **Mohamed Enterprises (T) Ltd v. Masoud Mohamed Nassor**, Civil Application No. 33 of 2012 and **Freeman Aikael Mbowe & Another v. Alex O. Lema,** Civil Appeal No. 84 of 2001 (both unreported) to the effect that, it is illegal for two courts of the same grade to overrule each other's decision.

The complaint on the third ground, in our reading, is based on the presupposition that, the trial Judge declared the respondent the lawful owner of the suit property basing on mere correspondences between the Ministry on one hand and the respondent, Data Machines Limited and their predecessor in title on the other hand. It was submitted therefore that, as long as there was no evidence of registration of the respondent's title in the register or a decree conferring such right on the respondent, the declaration that she was the lawful owner of the suit property was not founded on authentic evidence. On this, the counsel referred us to the cases of **Mekhiades John Mwenda v. Gizelle Mbaga (Administratrix of the Estate of John Japhet Mbaga-deceased and Two Others**, Civil Appeal No. 57 of 2018 and **Leopold Mutembei v. the Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development & the Attorney General**, Civil Appeal No. 57 of 2017 (both unreported) which judicially considered the commentary by Dr. Tenga and Mr. Sist Mramba in their **Land Law and Conveyancing in Tanzania** on the effect of registration of title.

In his conclusion, therefore, the decision of the trial court was erroneous in law and fact and should be set aside and the appeal allowed with costs.

In his submissions in refutation, Mr. Mponda contended that the complaint in the first ground of appeal is misplaced as the trial court did not make any order for apportionment and allocation of the three plots. Instead, he submitted, the finding of the trial court on separate ownership of the two contending interests, was based on concrete evidence from the record that, the two contending interests in the three plots were separately acquired by the respondent and Data Machines Limited by way of purchase from TIB in her receivership capacity herein mentioned. He submitted, therefore, that what the appellant purchased could not be more than what the said Data Machines Limited had.

On the second ground, it was Mr. Mponda contention that, in so far as the respondent was not a party to the execution proceedings which led to the confirmation of the sale of the property owned by Data Machines Limited, the alleged bar is quite irrelevant. In any event, he submitted, the issue was not raised at the trial court as what was at issue was ownership of the suit property which was addressed and determined based on the evidence. He did not agree with Mr. Mbamba that, the trial Judge overruled the decision of her fellow Judge as the decision in exhibit D3 has nothing to do with the respondent's property.

The third ground, Mr. Mponda submitted, is also misconceived as the decision of the trial court was limited to who was the lawful owner of the disputed properties. He submitted further that, the evidence on the record is clear that, the correction of the errors in the respondent's certificate was suspended pending determination of this case. He prayed, therefore, that the appeal be dismissed with costs.

For obvious reason, we shall start our discussion with the second ground of appeal wherein the decision of the trial Judge is criticized for being barred for the reason of the sale of the three plots becoming absolute. The absoluteness of the sale, it was submitted, crystalized after the application to set aside the same at the instance of Data Machines Limited was disallowed and the sale confirmed. For the respondent, it was contended, the said bar did not apply as the respondent was not a party to the execution proceedings which led to sale of the property and subsequent confirmation thereof.

We agree with Mr. Mbamba that, under O. XXI r. 90(1) of the CPC, a sale pursuant to a court order in execution of a decree becomes absolute where no application under rules 87, 88 and 89 is made or if made, where

the same is disallowed and the sale confirmed. The provision reads as follows:

> *"90.(1) Where no application is made under rule 87, rule 88 or rule 89, or where such application is made and disallowed, the court shall make an order confirming the sale and thereupon the sale shall become absolute:*
>
> *Provided that where it is provided by any law that a disposition of property in the execution of a decree or order shall not have effect or be operative without the approval or consent of some person or authority other than the court, the court shall not confirm such disposition under this rule unless such approval or consent has first been granted.*

The bar resulting from the sale becoming absolute under the above provisions, is stated in O. XXI r. 90(3) in the following words:

> *"(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made".*

In our view, for a bar under the above rule to apply, two conditions must be established. **First,** the suit in question must be a suit to set aside an order under rule 90 of O. XXI of the CPC. **Two,** the suit should have been filed by a person against whom such order is made.

In here, the application to have the sale set aside which was disallowed by the concurrent decisions of the executing court and the High Court as per exhibits D2 and D3 respectively, was made under O. XXI r. 88 of the CPC which provides as follows:

> *88-(1) Where any immovable property has been sold in execution of a decree, the decree-hoider, or any person entitled to shares in rateables 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."* (Emphasis supplied)

The application under the above provision, it is clear to us, is available only if the ground for setting aside the sale is material irregularity or fraud in publishing or conducting the sale. It does not apply, in a situation like this, where the ground is whether the judgment debtor had a saleable interest on the entire sold property or whether the executing court had jurisdiction to sell the property. Commenting on this, Mulla, one of the

renown scholars in civil procedure jurisprudence in his **Mulla, the Code of Civil Procedure,** 16th Ed. Vol. 3, remarked at page 2922 thereof as follows:

> *"The question whether the decree in execution whereof was sold was obtained without the service of summons on the judgment debtor, or whether the decree was obtained by fraud, or the* ***court had no jurisdiction to sell the property or whether a sale is a nullity, or that the property sold was not salable in execution****, is outside the scope of rule 90".* (Emphasis is ours)

Here in Tanzania, the above commentary was judicially recognized by the Court in the case of **Peter Adam Mboweto** (supra) in the following words:

> *"Such a sale can be set aside on grounds such as want of jurisdiction to sell the property, fraud or* ***want of saleable interests in the judgment- debtor,*** *but none of these existed in this case."*

The above discussion aside, as the application to set aside sale was made by Data Machines Limited in 2003 and the respondent's interest on the suit property having been acquired way back in 1994 as per exhibit P4, the respondent is not a person "against whom such order is made" within

the meaning of O. XXI r. 90 (3) of the CPC and she is, therefore, not affected by the bar in question.

Since we have held herein above that, the conclusiveness of the decision in exhibit D3 was limited only to the extent of material irregularity or fraud in publishing or conducting the sale, the decision of the trial court, in so far as it confined itself to whether the judgment debtor had title on the suit property, cannot in any way be said to have overruled the decision in exhibit D3. Neither the decision in exhibit D5. The complaint is thus neither here nor there.

The contention that the suit should have been pursued under O. XXI r. 62 of the CPC after the respondent had failed in an objection proceeding, is with all respects to Mr. Mbamba, unfounded as the bar under the respective provision arises where, which is not, there is an order issued by the executing court under O. XX1 r. 60 of the CPC. That is what appears to be the position in the case of **Bank of Tanzania v. Vallambhia,** Civil Appeal No. 15 of 2002 (unreported) where it was observed at page 8 thereof:

> *"Thus the decision of the High Court determining any objection to an attachment order is final except if disturbed by a judgment in a suit preferred under the rule. It is*

abundantly clear to me that there is no right of appeal to the court once an objection to the attachment has been adjudicated upon. The remedy open to the objector is to file a suit to establish the objection to the claim of the property in dispute."

In our opinion, therefore, the second ground of appeal is without merit and we dismiss it.

We now turn to the first ground of appeal. The claim in the first place is that, the trial Judge in effect separated the go-downs in question from the three plots at issue while there was clear evidence that, the appellant purchased all of them. The obvious question which follows is whether there was evidence that, the appellant had purchased all the three plots.

It is not in dispute that; the appellant purchased a landed property pursuant to a court order in execution of a decree. The execution, it appears, was for the purpose of realizing a decretal amount awarded to the decree holder one Ahmed Rajabu as against Data Machines Limited, the judgment debtor. Technically, therefore, the appellant's root of title on the purchased property is traceable from the said judgment debtor. It can thus be said with certainty that, Data Machines Limited was the appellant's predecessor in title. It is an established common law principle (and now it has been codified under section 67 of the Land Act) that, the purchase of a

possession from someone who has no title, denies the purchaser any ownership of title *(Nemo dat quad non habet).* Applying the principle in an issue like this, we held, in the case of **Hamis Bushiri Pazi and Others v. Saul Henry Amon and Others,** Civil Appeal No. 166 of 2019 (unreported) that:

> *"...since it is not in dispute that the 4th respondent's share in the suit property was, soon before the sale in question, 1/7, the fourth respondent being the only judgment debtor, had no title to pass to the second respondent other than the said share".*

It has also to be noted that, the jurisdiction of the executing court to attach and sell a property in execution of a decree under O. XXI r. 28 of the CPC, is only limited to the property of the judgment debtor. In line with this, we stated in the case of **Hamis Bushiri Pazi** *(supra):*

> *"It would sound to us to be the law that where, like in the instant case, a landed property is held under a certificate of title or letter of offer, the executing court cannot make any order for sale of the same in execution of a decree without having a prima facie evidence of the title of the judgment debtor on the property."*

In his evidence at the trial court, the appellant essentially relied on the proclamation for sale and certificate of sale in exhibit D1 to establish his

title on the three plots. He did not adduce any evidence to establish title of his predecessor in title on the purchased property before the sale. Mr. Mbamba's view on this is that; in a purchase through public auction pursuant to a court order, the purchaser is not bound to enquire into the validity of the title of the judgment debtor on the purchased property. We shall revert to this issue as we discuss whether the appellant was a *bonafide* purchaser for value without notice.

To the contrary, the respondent, aside from producing the sale agreement in exhibit P4 and the certificate in exhibit P5, she was able to produce the sale agreement in exhibit P7, which indicates that, what the appellant's predecessor in title purchased from TIB was only the office building at plot 23 and part of plot 22 while according to exhibit P4 the respondent purchased two go-downs at plot 21 and part of plot 22. This was confirmed by PW3, the witness from TIB. On top of that, there was a witness from the Ministry of Land (PW2) who confirmed that, exhibit P5 which was issued basing on the sale agreement in exhibit P4 had mistakenly included the office building at plot 23 and part of plot 22 and that, the error would have but for the dispute at hand, been corrected by having the three plots partitioned to reflect the two contending interests. With this evidence, the trial Judge, in our view, cannot be faulted in holding as she did, that

the go-downs in question belonged to the respondent and that, the acquired interest by the appellant was only limited to the office building at plot 23 and part of plot 22.

This now takes us to the issue of whether the appellant was a *bonafide* purchaser for value without notice. We wish to state right away that, the said common law defense is part of our land law. See for instance, **Peter Adam Mboweto** (supra), **Hamis Bushiri Pazi** (supra) and Balozi **Abubakar Ibrahim and Another v. MS Benandys Limited,** Civil Revision No. 6 of 2015 (unreported).

It is trite law however, that for the said defense to apply, the purchaser should have not only purchased the property for value but without notice of the defect in title of the vendor as well. The notice needs not necessarily be actual. It would suffice if it was a constructive or imputed notice. In respect to registered land as in the instant case, a purchaser is fixed with constructive notice of everything that he would have discovered had he investigated into the title of the vendor on property. On this, section 167 (b) (i) provides as follows:

> *"(b) a person obtaining a right of occupancy or a lease by means of a disposition not prejudicially affected by notice of any instrument, fact or thing unless-*

(i) it is within that person's knowledge, or ***would have come to that person's knowledge if any inquiries and inspections had been made which ought reasonably to have been made by that person****; or"*

See also the English cases of Re **Cox and Neve's Contract** [1891] 2 Ch. 109, **Oliver v. Hinton** [1899] ChD 264 and **Bailey v. Barnes** [1894] 1 CHD 25. Here in Tanzania, this position was discussed in the case of **Hamis Bushiri Pazi and Others** (*supra*), where it was observed:

"As the suit property appears from the ruling in exhibit D2 to be held under a letter of offer with a plot and block numbers, and there being information in the said exhibit that the same was jointly owned by the fourth respondent and her relatives, the second respondent having purchased the property without prior inquiry into the extent of the title of the judgment debtor on the suit property, cannot qualify as a bonafide purchaser for value without notice. This is because in the circumstance of this case, any reasonable man would have expected the second respondent to, before purchasing the suit property, inquire and find out in the relevant authorities what interests, if any, the said fourth respondent's relatives had in the suit property. Her unreasonable omission to make an inquiry, put her to constructive notice and/ or imputed notice of the appellants' ownership interests on the suit property"

There was also a contention that the duty to inquire into the title of the property to be sold does not arise where a sale is through public auction in execution of the decree. Reliance was placed on the case of **Peter Adam Mboweto** *supra* . We have carefully read the said authority and with greatest respect to Mr. Mbamba, it does not support that proposition. The enquiry discussed in the said decision, in our reading, does not relate to the issue of the judgment debtor having saleable interest. Neither the issue of the executing court selling a property without jurisdiction. Instead, the inquiry therein discussed pertains to the suit. As can be observed at page 338 of the report, the Court judicially applied the following statement from the **Commentaries on the Civil Procedure Code** by Chitaley Vol. 2 (6th Edition) at page 1716". Thus:

> *"In the case of bona fide purchasers, the rule is that the sale will be upheld notwithstanding the reversal of the decree, because otherwise there will be less inducement to intending purchaser to buy at an execution sale and consequently less chance of the property fetching a proper value at such sales. Another reason is that* ***a purchaser cannot be expected to go behind the judgment to Inquiry into irregularities in the suit".*** (Emphasis supplied)

In this case, it is apparent, the three plots were registered. Therefore, had the appellant made an inquiry at the registry of titles, he would have obviously found the certificate of title in exhibit P5 which covered the three plots and, he would have as well, discovered that; the interest of his predecessor in title was the office building at plot 23 and part of plot 22 which was mistakenly included in exhibit P5. Though in accordance with exhibit P9, the appellant was aware of the obvious risk that might have arisen, he did not bother to make any inquiry. In the circumstances, the appellant had constructive notice that his predecessor in title had only a saleable interest on the office building at plot number 23 and part of plot 22 and, therefore, his certificate of sale could not operate as to take away the property of the respondent who was not privy to the decree against the appellant's predecessor in title. The trial Judge was therefore correct in all fours.

This now takes us to the last ground wherein the trial Judge is blamed in holding that, the respondent was the lawful owner of the go-downs at plots 21 and part of plot 22 basing on mere correspondences. This issue cannot consume much of our time, for we have already held, in relation to the first ground of appeal that, the trial court's determination of the respondent's ownership of the suit property and the saleable interest that

the appellant's predecessor in title had at the time of execution, was based on concrete evidence and not mere correspondences as alleged by the appellant or at all. The authorities cited by the learned counsel for the appellant in the relation to the effect of registration of title are, therefore, inapplicable in the instant matter. The third ground is thus dismissed.

In the final result and for the foregoing reasons, therefore, we find this appeal devoid of any merit. It is accordingly dismissed with costs.

DATED at **DAR ES SALAAM** this 19th day of May, 2023.

S. E. A. MUGASHA.
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of May, 2023 in the presence of Mr. Stiven Byabato holding brief for Mr. Samson Mbamba, learned counsel for the Appellant and Mr. Stiven Byabato, learned counsel for the Respondent, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL