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**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL APPEAL NO 144 OF 2003

ALLY SHUNDA APPELLANT

VERSUS

S.B. KAVISHE RESPONDENT

JUDGMENT

ORIYO, J:

The appeal arose from proceedings in the Resident, Magistrates Court at Kinondoni, Dar es salaam, in Misc. Civil Cause No. 20 of 2003. On 23/4/2003, Mr Kifunda, learned counsel, filed Exparte Chamber Application on behalf of S.B. Kavishe, the respondent. The exparte application was made under the provisions of SECTION 95 of the Civil Procedure Code 1966; supported by the respondents affidavit and was accompanied by a Certificate of Urgency.

The following orders were sought against Ally Shunda, the appellant:-

- (a) A declaration that the respondent has failed to pay USD 11,500 to the applicant*

(b) A declaration that the deposited security to wit Plots No. 706 and 707 Block "B" Msasani Village are entitled to be sold to liquidate the debt of USD 11,500.

(c) Cost

(d) Other reliefs.

On the next day, 24/4/2003, the trial Court (Mbuya, PRM) heard oral submissions by the respondents Counsel, *ex parte* and granted the application as prayed.

On 26/5/2003, the appellant, through Mr. Kishaluli, learned counsel, filed a Chamber Application at the trial court seeking the following orders:-

- 1. Extension of time to apply for stay of execution*
- 2. Grant stay of execution and raise attachment on property on plots 706 and 707 Block "B" Msasani Village, pending hearing of main suit inter partes*

3. *Set aside exparte judgment and, the suit be heard on merits.*
4. *Costs.*
5. *Other reliefs*

In response to the application the respondent raised a preliminary point of objection that the application was fatally defective because it contained 3 distinct prayers/applications but supported by only one affidavit. He contended that the application as filed contravened the provisions of Order XLIII rule 2 of the Civil Procedure Code and that the same should be dismissed with costs. The appellant also raised a preliminary objection that the respondent's counter affidavit was filed out of time without the leave of the court and prayed that the counter affidavit be struck out with costs.

Ruling on the application was delivered on 1/8/2003. The objection by the appellant was overruled in that filing the counter affidavit out of time was not fatal. The court did not uphold or reject the objection by the respondent that the application was defective. However, the application was dismissed with costs. The trial court's reasons for the dismissal are contained in the last 2 paragraphs of the Ruling at page 2 thereof as follows:

" It is also the court's view that, this was the application for declaratory orders asking the court to declare that the debtor/applicant had failed to pay debts and that his properties deposited for security be sold to liquidate the debt of USD 11,500.

There was ample evidence that, the debtor/applicant just out of his will consented his plots of land to be sold in case of default to pay the debt as agreed. Unfortunately, when the time reached to pay he fled outside the Country. It is the considered view of the Court further that the applicant consented his properties to be sold ;in satisfaction of the debt in respect of the deed of agreement.

It follows therefore that, prayers in the Chamber Summons made by the applicant are devoid of merits as there was no suit determined exparte by this Court. Consequently the said applications are hereby overruled with costs."

Meanwhile, according to the record, execution was assigned to M/S Unyangala Auction Mart, who paid the decretal sum to the respondent on 26/5/2003, as per copy of a Petty Cash Voucher No. 00092 of the same date.

Naturally the appellant expressed his dissatisfaction with the said ruling and filed this appeal on 18/8/2003 with 6 grounds of complaints. The parties retained the same representation of counsel on appeal as in the trial court. In response to the appeal, the respondent filed a preliminary objection on 4/10/2005 that the matter had been overtaken by events because execution had already been effected by completion of sales transactions and the title passed to a bona fide purchaser. A letter of Offer of a Right of Occupancy to one MOHSIN SOMJI over Plot Nos 706 and 707 Block "B" Msasani Village dated 12/11/2005 was annexed thereto.

Before delving into the merits of the appeal, I am of the view that, due to the nature of the dispute, it will be in the interest of justice to consider the suit as a whole, from the date of filing.

The suit was initiated by an Exparte Chamber Application under Section 95 of the Civil Procedure Code and orders were granted on the following date, as prayed. The main documents in support of the application was the undated affidavit of S.B. Kavishe and the Deed of Agreement. The agreement made between the parties on 6/2/2003 was on the following terms and conditions:-

"1. That the Debtor shall Deposit his Title Deed with

Reference No DCC/10/56669/5/SM of Plot No. 706 and 707 Block "B" Msasani Village, Dar es salaam as security until the whole liability has been liquidated.

2. *That the said Right of Occupancy shall be in custody of the Advocate until full payment.*
3. *The Debtor shall liquidate the said liability within ninety days (90) from date of signing this deed, failure of which the said plots shall be sold by the Creditor.*
4. *That immediately after depositing the Right of Occupancy to the Lawyer and signing this Deed, the Debtor shall collect his passport which is in custody of Police Officials.*
5. *That all other costs likely to be incurred by the Creditor shall be borne by the Debtor.*

*SIGNED and DELIVERED by
ELIAS JULIUS KIFUNDA*

*.....
on behalf of S.B. KAVISHE this 6th*

*day of FEBRUARY, 2003 at
Dar es salaam.*

*Signed
CREDITOR*

*Signature : Signed
Postal Address : P.O. Box 14593*

DAR ES SALAAM
Qualification : ADVOCATE

SIGNED and DELIVERED by the said
ALLY ISSA MUSSA @ KISHUNDA
This 6th day of FEBRUARY 2003
At Dar es salaam

Signature : Signed
Postal Address : P.O. Box 14593,
DAR ES SALAAM.

Qualification : ADVOCATE

DRAWN BY:-
KIFUNDA & Co.
ADVOCATES,
SIDO SMALL BUSINESS HOUSE,
BIBI TITI MOHAMED ROAD,
P.O. BOX 14593,
DAR ES SALAAM."

According to paragraph 3 of the Agreement, the debtor was required to repay within 90 days counted from 6/2/2003; and 90 days were to expire on 5/5/ or 6/5/2003 depending on whether February had 29 or 28 days respectively. Therefore the application filed on 23/4/2003 and the trial court's orders of 24/4/2003 were fraudulently premature and wrong because the appellant had not defaulted the 90 day deadline yet. Further the counsel who drew up the Agreement, ELIAS JULIUS KIFUNDA; signed the agreement as a party on behalf of S.B. Kavishe and prosecuted the matter. This was in contravention of the provisions Cap 12 Revised Edition 2002, the

Notaries Public and Commissioners for Oaths Ordinance. The Deed of Agreement was incompetent and ineffective; and ought to have been struck out from the proceedings.

The other document in support of the application was the affidavit of S.B. Kavishe which did not state the date on which it was made in the jurat contrary to section 8 cap. 12 above. His statements through paragraphs 4, 5, 6, 7 and 8 of the affidavit were as follows:-

- " 4. That the said period of "90" days has elapsed without the respondent fulfilling his promise.*
- 5. That the failure of the respondent to pay the debt within 90 days as agreed is indication that the Respondent has failed to raise the money for the said purposes.*
- 6. That the respondent is nowadays not seen, in fact he has already fled outside the country, he cannot even be traced for purposes of service.*
- 7. That hence this affidavit is sworn to verify that there are sufficient reasons to grant my prayers in the chamber application.*

8. *That all what have been stated above from paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 inclusive is true to my own knowledge.*

*Sworn at Dar es salaam by
S.B. KAVISHE in my presence
This Day of April, 2003'* } *Signed*

BEFORE ME:

Signed COMMISSIONER FOR OATHS

It is obvious that the contents of paragraph 4 of the affidavit are not true; the deponent lied on oath and could be cited for perjury; for he knew very well that 90 days deadline from 6/2/2003 had yet to expire. The contents of paragraphs 5 and 6 are speculative and in contravention of Order XIX rule 3 Civil Procedure Code which states:-

*" 3 - (1) Affidavits **shall** be confined to such **facts** as the deponent is able of his own knowledge to prove." (emphasis supplied)*

Again, the contents of paragraph 8 are not true. To say the least, the affidavit of S.B. Kavishe was incurably defective in that it offended the provisions of Order XIX rule 3 above and Section 8 of Cap 12 Revised Edition.

With due respect to the trial court, it arrived at its decision of 24/4/2003 having relied on an incurably defective affidavit and an incompetent Deed of Agreement. The application was fraudulent and the resulting proceedings decisions and orders of trial court were tainted with fraud.

On the Chamber Application itself filed on 23/4/03, it did not bear the signature of the admitting magistrate and did not indicate the hearing date either. One is left in speculation on how Mr. Kifunda, advocate for the respondent, got to know that the matter had been fixed for hearing on 24/4/2003

It was also of interest to note that the application was accompanied by a Certificate of Urgency. One might wish to inquire as to the purpose of the Certificate. Even assuming it to be true, for the sake of argument, that the appellant had fled the country to avoid liability; the 90 days deadline had not expired yet and the appellant might have intended to return before the expiration of time. Not only that, but the respondent had adequate security in his favour; title deeds over 2 properties were deposited with his counsel; there was no reason for urgency as the 90 days had not expired and the respondent was adequately secured.

In view of the glaring irregularities and improprieties demonstrated above and inherent in the proceedings that led to the decision of the trial court of 24/4/2003, I need not look into the merits of the appeal. However, I feel constrained to exercise my revisional power under SECTION 44 (1) (b) of the Magistrates Courts Act 1984 and I hereby quash and set aside the proceedings, decisions and orders of the trial court in Misc. Civil Cause No. 20/2003. The same are nullified ab initio.

Accordingly, I allow the appeal. The appellant to have costs in this court and in the court below.

K.K. Oriyo

JUDGE

6/2/2006